IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

UNITED STATES OF AMERICA, ex rel. ALEX DOE, Relator,	2:21-cv-00022-Z
THE STATE OF TEXAS, ex rel. ALEX DOE, Relator,	Tuesday, August 15, 2023 10:07 a.m. - 4:38 p.m.
THE STATE OF LOUSIANA, ex rel. ALEX DOE, Relator,	
Plaintiffs,	SUMMARY JUDGMENT HEARING
VS.	
PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., PLANNED PARENTHOOD GULF COAST, INC., PLANNED PARENTHOOD OF GREATER TEXAS, INC., PLANNED PARENTHOOD SOUTH TEXAS, INC., PLANNED PARENTHOOD CAMERON COUNTY, INC., PLANNED PARENTHOOD SAN ANTONIO, INC.,	
Defendants.	

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MATTHEW J. KACSMARYK

UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE COURT: The Court calls Civil Action Number 2:21-CV-022-Z, United States of America vs. Planned Parenthood Federation of America, et al., for hearing on the pending motions for summary judgment.

Are the parties ready to proceed?

MS. HACKER: Yes, Your Honor.

MR. MARGOLIS: Good morning, Your Honor, yes.

THE COURT: And for the defendants?

MR. ASHBY: Yes, Your Honor.

THE COURT: Okay. So let's take care of the Coronavirus finding and then we'll proceed.

The Court is holding this pretrial conference in the midst of the COVID-19 Coronavirus pandemic pursuant to the Twelfth Amended Special Order Number 13-9 signed by Chief Judge Godbey. This Court expressly concludes and hereby finds that this hearing may be conducted in person without seriously jeopardizing public health and safety and cannot be further delayed without serious harm to the interest of justice.

This Court is also open to the public, including an overflow room equipped with a live audio stream, and the Court separately ensured that half of the remaining gallery space was available to members of the media if necessary; the other half are for members of the general public.

Also, any disrupters will be immediately escorted by

the marshals off the premises, and counsel shall notify the Court if they anticipate or discern that there's any disruption.

So on housekeeping, counsel may speak from the lectern or they may speak from counsel table. I just ask that we have a one-argument, one-attorney rule. So please designate to the Court who is speaking on which issue for which party.

I'll ask at this time that plaintiff, relator counsel, identify the attorneys who will be speaking for that party.

MS. HACKER: Good morning, Your Honor. My name is Heather Hacker. I represent the relator. I will be arguing on behalf of both relator and Texas this morning. I will also be joined by Mr. Wassdorf, who is an attorney for the State of Texas, and he will be arguing for 15 minutes this morning.

THE COURT: Okay. You may divide your time however you choose. I just ask that you identify yourself as the speaker and the party for which you represent.

Now, for PPFA and the affiliate defendants, I'll just ask that counsel identify themselves and who will be speaking for which parties.

MR. MARGOLIS: Good morning, Your Honor. Craig Margolis. I represent the affiliate defendants and I will be speaking on behalf of the affiliate defendants this morning.

MR. ASHBY: Good morning, Your Honor. Danny Ashby for PPFA, along with Anton Metlitsky. He will be speaking, addressing the summary judgment issues; I'll be addressing the pretrial publicity issues.

THE COURT: Okay. So today's conference will cover the parties' pending motions for summary judgment as those issues are listed in ECF Document Number 513. So I'll ask that the parties orient their arguments around those issues. The Court will be asking questions relevant to those issues as identified in that order. This conference will not address any pending motions or anything relevant to the sealing or unsealing of documents. Those motions remain pending, but I am not inviting argument on those. The Court will adjudicate those separately, and I don't anticipate that the parties should waste any time arguing about sealing and unsealing documents. We'll take those up in turn but not at today's hearing.

So as discussed in the scheduling order, plaintiffs and defendants will each be afforded two hours to present their argument. This time will include answers to any questions from the Court and the Court's question. My law clerks will be keeping time. So we'll use the time clock methodology. If at any point you need a time check to better allocate your time, just ask for a time check from my courtroom deputy or the law clerks and we can provide that.

Now, the plaintiffs and defendants will be responsible for allocating their own time per individual party and per attorney, and again I'll just ask that you orient your argument towards those nine questions presented in the scheduling order ECF Document Number 513. Plaintiffs do have the right to reserve time for rebuttal.

Now, as a warning to any attorneys who thought that they were going to read from their outline for two hours, this will more resemble an oral argument at the Fifth Circuit. So I know that we have attorneys who are experienced at appellate arguments, so this will more resemble an appellate argument. If I'm interrupting you at any point, it's not because I disagree or that I'm attempting to be rude, it's only I'm trying to move on to questions that the Court needs answered. So if I'm interrupting you that is not because you're doing a bad job, it's just trying to make good use of time and ask questions that matter to the Court.

And I believe, Ms. Hacker, did you state that you are reserving 15 minutes in rebuttal?

MS. HACKER: No, Your Honor. We would like to reserve 30 minutes for rebuttal.

THE COURT: Okay. So I'll instruct my CRD and clerks to make that allocation, and we'll notify you when you're approaching that point in your time. Are you asking a particular time check at any intervals: five minutes, two

minutes, one minute?

MS. HACKER: Your Honor, it would be helpful to us if we could have a time check at one hour and 15 minutes. That's approximately when I'll hand over to the State of Texas.

THE COURT: Okay. I'll instruct my CRD and clerks to advise me to advise you when you're approaching that point.

So at this time the plaintiffs may proceed with their portion of the case. As stated in the scheduling order, we will break at that one-hour-15-minute interval to allow defendants time to reassemble the courtroom and use the courtroom technology if necessary.

At this point, Ms. Hacker, you may proceed.

MS. HACKER: Thank you, Your Honor.

And just as a note of clarification, I intend to argue for approximately an hour and 15 minutes. Then I will hand the lectern over to the State of Texas for 15 minutes, and we would like to reserve our remaining time or 30 minutes for rebuttal.

THE COURT: And this will be Mr. Wassdorf, is that correct?

MS. HACKER: Yes, Your Honor.

THE COURT: Okay. Please proceed.

MS. HACKER: Just a couple of other logistical notes, we have included citations to materials from the summary judgment record in our slides, both to the ECF page number as

the Court requested and to the page number in the plaintiffs' appendix. We have those documents, any documents that are cited in our presentation, prepared and can bring them up on the screen if the Court wishes to delve deeper into any of those that are cited.

I will proceed through the argument with those questions -- the questions that the Court gave us in the order as an outline unless the Court has other questions.

I also have a printout of our slides, a hard copy, if the Court would like to have that for its use.

THE COURT: Okay. If you can present that to the CRD, I'll distribute that to the clerks and we'll make reference to that as necessary.

MS. HACKER: Yes, Your Honor. With those notes, I'll get started.

There have been over 500 filings in this case to date, hundreds of pages of summary judgment briefing and thousands of pages of evidence submitted to the Court, but the essence of this case is quite simple and the material facts are not in genuine dispute. Planned Parenthood Federation of America's Texas and Louisiana affiliates were Medicaid providers. They provided services to less than a half a percent of Medicaid recipients in each state. They were terminated as providers by the states from both programs for failing to comply with program requirements and did not contest

these terminations in administrative proceedings, resulting in the terminations becoming final.

These affiliates, along with PPFA, obtained preliminary injunctions in federal courts to prevent the states from enforcing these terminations that were later overruled and vacated. During the pendency of the preliminary injunctions Planned Parent had continued to bill Medicaid and received over $17 million in Medicaid funds despite being terminated from the programs. Yet, once the Fifth Circuit determined that these injunctions were legally baseless, Planned Parenthood did not repay this money it had received that it was not entitled to.

Instead, Planned Parenthood began a series of maneuvers to try to avoid the states' enforcement of their terminations for as long as possible so they could get as much taxpayer money as they could. They expressly prolonged this so that PPFA's purposes would be served so that they could, quote, "milk the situation from media coverage, attack and pressure the state's governors to let them back into Medicaid and get the attention of the Biden Administration."

But Planned Parenthood admits that it never paid the money back, not just not within 60 days of when it should have known it was obligated to as required by the law, but never. As a result, Planned Parenthood is liable for Medicaid fraud under the federal False Claims Act, the Texas Medicaid Fraud Prevention Act, and the Louisiana Medical Assistance Integrity

Law.

THE COURT REPORTER: I'm sorry, counsel. Can you please slow down for me?

MS. HACKER: Sorry. That was the Louisiana Medical Assistance Program Integrity Law.

These laws impose strict penalties for noncompliance in order to deter fraud on the government. Given the large amount of money and hundreds of thousands of claims at issue, these laws mandate severe penalties, not just repayment of the taxpayer money Planned Parenthood received, but also treble damages, civil remedies and a $12,000 penalty per claim filed. As plaintiffs have demonstrated, Planned Parenthood is liable under all three laws and the Court should grant summary judgment to the plaintiffs and impose the mandatory civil remedies and civil penalties required by those laws.

THE COURT: Now, Ms. Hacker, what is your best case to support the argument that affiliate defendants have an obligation to return overpayments? I'm just instructing staff here to make certain that opposing counsel can see your outline as it's presented on that screen.

Now, assuming Arkadelphia is your best case but without prejudice to case selection, what's your best case to support your argument that there is an obligation to return overpayments?

MS. HACKER: Well, I think the statutes make clear

the definition of the overpayment. And I will --

THE COURT: And is there any case that you can cite to in your briefing where FCI liability has been opposed under facts similar to this case, specifically the odd procedural history of this case where we have a federal court preliminary injunction followed by Fifth Circuit vacatur and there's an argument about that chronology and the effect of various injunctions and court interventions? Is there a case this Court should look to other than Arkadelphia in deciding the effect of that procedural history on a pending claim that's subject to FCA repayment?

MS. HACKER: I think the National Kidney Patients case is a good one, Your Honor, and also the Children's Hospital vs. Azar case that we discussed in our briefing. That case in particular -- you know, these facts are a little bit unique, but the Azar case in particular is very instructive here because the -- there was an injunction. I believe it actually may have even been a permanent injunction that was issued by a court against a rule, and as the parties proceeded through the litigation, the recipient kept getting Medicaid funds or may have been Medicare funds in that case under that injunction but then it was overruled on appeal.

And so the parties went back to the district court to ask when the rule was considered to have gone into effect. Would it have been after the appellate court's mandate, or

would it have been at the time that the rule originally would have gone into effect. Because what was at stake was all the money, the extra money, that the recipient received as a result of the rule being enjoined. The court said that the rule was in effect as of the original date, and the injunctions did not affect that date. So in essence, the recipient would have been required to pay back the money that it received while the injunction was pending.

THE COURT: So let's talk about another period in that chronology, the grace period that both parties reference in their briefs to this Court. Why did the affiliate defendants have to return funds during that grace period and also what of defendants' argument that Texas could not have lawfully reimbursed affiliate defendants because they're terminated from the relevant federal programs?

MS. HACKER: Yes, Your Honor. In terms of the grace period, that actually is not included within our reverse false claim. That is included within relator's implied false certification claim. So those two requests for relief do not overlap.

As far as whether or not they could have lawfully received reimbursement during that time, I'm not aware of any law that prevented that. The state exercised its discretion in allowing Planned Parenthood, based on their representation, to transition their patients to other providers. That was the

explicit purpose of the grace period, and it was only for 30 days.

THE COURT: Okay. And so I'm trying to establish a baseline chronology. I know the parties disagree on the legal effect of various court interventions and that the pendency of injunctive relief and the rest, but here under the ACA, I believe the obligation to return overpayments at a minimum starts within 60 days. So here I'm referencing 42 U.S.C. Section 1320a-7(k). And I'm also looking forward to the Fifth Circuit's Kauffman decision in trying to decide a starting point for potential liability.

I understand the 60-day period has a bit of a statutory anchor that's an easy baseline to set, but if federal injunctions do not stay administrative deadlines, why wasn't their deadline to return overpayments even earlier than that? How is this all supposed to work while we have competing statutes and competing court interventions? What chronology do you propose this Court to use in setting a timeline?

MS. HACKER: So the timeline that we propose is 60 days from when the defendants knew or should have known they were not entitled to the money, and so we believe that would have been on November 23rd, 2020. That was when the Fifth Circuit's en banc decision was announced and that decision vacated the Texas preliminary injunction and overruled the case affirming the Louisiana preliminary injunction.

So it was at that point that there was essentially no excuse for Planned Parenthood to not know that the funds that they received during the pendency of those preliminary rulings would need to be returned to the government pursuant to the Medicaid rules and regulations.

THE COURT: Okay. So I think I have your argument there on chronology and how these intervening injunctions and vacatur's work and the timing of the obligation to repay. I didn't see -- I know we'll get to scienter on various claims later. I didn't see any briefing on improperly. So everybody is dealing with this quasi-criminal statute that deals with a knowingly scienter requirement, but what about the improperly part of that? Does that do any work for plaintiffs' claims in this case? I didn't notice any briefing by either side on the second part of that knowingly and improperly standard.

MS. HACKER: Your Honor, I'm not aware of any case law that expressly examines the word "improperly" within the statute, but I think that just based on a reading of all three of the statutes the word improperly could just be -- I think that the statute itself defines what was -- what would be improper conduct. So I don't think it imposes any other obligation or requirement to show liability.

And if -- the word improperly actually only appears in the False Claims Act and the TMFPA; it is not in the LMAPIL. So --

THE COURT: Okay. Understood. So I wanted to clear that hurdle before turning to that knowingly standard. What is your best evidence now that the Court has spent time going through exhibits that were attached to motions and appendices? What is your best evidence at this MSJ phase that defendants knowingly violated the FCA, and you can identify exhibits using the reference points the Court ordered the parties to follow.

MS. HACKER: Yes, Your Honor.

So just by way of introduction to this point, we'd like to note that the Supreme Court in June in the Schutte case specified that to satisfy the scienter requirement of the False Claims Act, either actual knowledge deliberate and ignorance or recklessness will suffice.

THE COURT: And so if I have to look at various e-mails and documents produced during discovery, where do I find that knowing violation of the FCA?

MS. HACKER: Yes, Your Honor. I apologize. I'm getting there.

THE COURT: Oh, there's a lot of evidence in this case, so I understand it's voluminous and you can take your time.

MS. HACKER: Yeah. So first of all, Medicaid providers are legally required to know all Medicaid-related policies and laws of each state, so both the affiliates and PPFA are aware of all of those things. Specifically, the facts

relevant to the liability here, Planned Parenthood knew that they had been terminated. They consciously chose not to contest those terminations in State proceedings.

And so, Brian, if you could pull up this document, please.

So -- so this is a document -- this is an e-mail exchange between PPFA counsel and the Louisiana Department of Health.

And, Brian, if you could pull up the relevant language.

THE COURT: And this is ECF Document 482-1, page 15 of 553.

MS. HACKER: This is ECF 519-1 at 14 through 17.

THE COURT: Okay. Please proceed.

MS. HACKER: So this document shows that Planned Parenthood expressly asked the Louisiana Department of Health when their termination date was. Louisiana Department of Health then responds and says, "Yes, you are correct. The termination date is October 17th if you do not exercise your right to an informal hearing or administrative appeal."

Brian, could you pull up the next language?

So then PPFA follows that inquiry up with the fact that she says, "The letters to Ms. Linton state that the termination action will take effect after the termination of all administrative and/or legal proceedings." So in other

words, the administrative action would be suspensive on the termination. Does this stay apply if PPGC elects to continue in federal court.

Could you pull up the next language, Brian?

And LDH's response is that the suspensive nature only applies if you proceed through the administrative process. If your client forgoes that clear avenue of affording your client clear full due process, I don't believe my client can make that commitment. More clear, my client does not believe you have an election to continue in federal court. The administrative avenue is the agreed-upon process to protect your client's rights.

So this document demonstrates that Planned Parenthood knew that if they did not contest the findings in the administrative procedure, the termination would become final and that the federal proceeding would have no impact on that.

Next, even before Planned Parenthood received a final notice of termination, they knew that there are penalties for billing Medicaid when they're excluded from the program and they knew that it was legally questionable for them to continue seeing patients after termination.

Would you bring up that document, please?

So here's an e-mail from Sheila McKinney, who works for PPGT or did at that time, and she's stating, "There are penalties for us billing when we are excluded from the program,

so we do not want that."

And then this is also an e-mail between employees of PPGT. She says, "Please let me know what the attorneys say about the legality of our providing services to Medicaid patients after the date of termination. I am not quite as confident as Ken that we will win the overall fight." Ken is a reference to Ken Lambrecht, the CEO of PPGT. "And I am also not comfortable assuming we will get paid for any claims that happen after termination."

Could you go to the next one?

And then Ms. McKinney responds, "PPFA attorneys are going to talk with me this afternoon and I will keep you posted." Planned Parenthood also knew that receipt of reimbursement does not mean continued entitlement. They had been subject to recoupments before and one affiliate even returned PPP loan money after their eligibility was publicly questioned but the government had not made any determinations on that point.

They also knew that once the Fifth Circuit ruled in Kauffman and then injunctions were vacated, that the states could enforce the terminations, and that's demonstrated by the e-mail reference there. And the legal nullity of invalid injunctions and the retroactivity of courts' decisions is long established black-letter law.

Additionally, if there was any question that they

should have paid the money back, Planned Parenthood simply just recklessly disregarded it. For example, the PPGT CEO testified that he didn't even read the termination letter and still hasn't read the whole thing.

Could you pull up that document, please?

This is an excerpt from Mr. Lambrecht's deposition stating that fact.

Moreover, if there were any questions about their eligibility to keep these funds, they could have called the provider relations hotline in both states. They had done so before many times and they knew also about the self-disclosure protocols for possible overpayments. Instead, they took unreasonable risks assuming they would never be held accountable for keeping taxpayer money they weren't legally entitled to. This goes to some of the things I mentioned in my introduction.

The defendants' strategy was explicitly to delay termination and keep this litigation going, stay in the Medicaid fight to get the attention of the Biden administration and force Texas to put Planned Parenthood back in Medicaid. Planned Parenthood also never reported and even attempted to hide their termination from Texas Medicaid from the Louisiana Department of Health because, quote, "The attention on that fact would impact their efforts to pressure the governor to let them back into Medicaid." Those are PPFA's efforts.

They even contemplated working around their termination for Medicaid by getting new TPI numbers for their physicians so they could keep their patients and also set up new nonexplicitly Planned Parenthood entities that would still be nevertheless governed by PPFA's medical standards and guidelines and insured by PPFA's captive insurance company.

THE COURT REPORTER: Counsel, can you please slow down for me?

MS. HACKER: Sorry, yes.

Your Honor, there are additional facts that are discussed in our briefing, but we felt that those were the most prominent ones that quite simply demonstrate the knowledge requirement is satisfied here.

THE COURT: Okay. So is it enough to hold that affiliate defendants knowingly violated the FCA at the summary judgment phase, or do we have a remaining fact issue where there's conflicting evidence and briefing to this Court about the effect of some of these e-mails, transcripts? I have my own flagged e-mails that relate to the knowingly standard that applies in an FCA case. Is there enough here to tip the scales for summary judgment, or are we dealing with a lingering fact issue for the jury?

MS. HACKER: So, Your Honor, I think the e-mail evidence, the documentary evidence, simply bolsters the facts that are set forth that are really indisputable and that would

be the facts that I originally discussed. And these are just -- you know, their requirement to be aware of all the laws and regulations, the fact that injunctions don't -- especially not preliminary injunctions don't immunize you from having to pay back money you received under that injunction, that's black-letter law. All the things on this slide here are things that they all either knew, we have to presume that they knew because of the requirements or they should have known and that is all enough to satisfy the knowledge standard.

So I think the e-mail -- the various e-mails that we discussed support the fact that they knew or should have known, but these facts in particular I think are enough to demonstrate that the requirement is satisfied.

THE COURT: Okay. So looking at the implied false certification theory which is briefed by both parties, I want to make certain that I'm using the correct terminology and that the record's clear. Here I'm referencing that second -- I'm sorry, the first clause of 31 U.S.C. Section 3729(a)(1)(G), Clause 1, sometimes referred to as implied false certification, focusing on the relator's allegations for claims submitted before the termination notice was sent.

So here I think the correct chronology is sometime between approximately 2011 and 2015. What disclosures to the states Texas and Louisiana should have been made in these claims but were not, and if you can cite some analogs from

jurisprudence that could serve as guide points to what would be material to either Texas or Louisiana in deciding whether those certifications were impliedly false.

MS. HACKER: Yes, Your Honor. I'd like to start by pointing the Court to 31 U.S.C. 3729(a)(1)(A), which is the statute for the implied false certification, the language of the first clause of subsection (G) is similar. But the FCA and LMAPIL both impose liability on a provider who knowingly presents or causes to be presented a false or fraudulent claim for payment or approval.

The TMFPA is a little bit broader in scope and authorizes liability for anyone who knowingly makes, causes to be made, induces or seeks to induce the making of a false statement or representation of material fact. The rest of that language is there. In terms of the 2011 to 2015 claims, the relator did not request summary judgment on those claims, but Planned Parenthood did ask for summary judgment on those.

So the -- those claims were impliedly false because every time the provider submits claims to the government they have to certify that they are in compliance with all Medicaid rules and regulations. If they are not in compliance, then that -- that affirmation is then false. So in United States ex rel Lemon vs. Nurses To Go, the Fifth Circuit said that the Supreme Court made clear that defendants could be liable under the FCA for violating statutory or regulatory requirements,

whether or not those requirements were designated in the statute or regulation as conditions of payment.

So the termination notices in both Texas and Louisiana recount the states' findings that Planned Parenthood was not in compliance with program requirements. That was in fact the reason for their termination from both programs. Planned Parenthood did not contest those determinations. So those determinations stand. We have determinations uncontested from both Texas and Louisiana that Planned Parenthood violated program requirements.

THE COURT: The violations of program requirements, do they relate back to the video that relator presented or are there other noncompliance issues that should have been disclosed? Is it just the videos or are there other noncompliance bases for the determinations of both Louisiana and Texas? Am I just looking at the videos or are there other noncompliance issues that should have been disclosed in those initial certifications? I just want to know like what is the body of evidence, what exhibits reflect that they were in noncompliance. Is it just the videos?

MS. HACKER: So in the Texas letter of termination, it -- all of the claims -- or all of the reasons they were not in compliance stem back to -- and this is the final notice of termination -- stem back to the evidence that was shown in the videos -- or the video, excuse me. The Louisiana letter did

reference the video but also referenced additional, I believe, nondisclosure violation -- or disclosure violations. They were various facts that they were supposed to have disclosed to Louisiana -- the Louisiana Department of Health, and they did not do so. So that was an additional basis for Louisiana's decision to exclude them from the Medicaid program --

THE COURT: Okay. So how does this Court test materiality in a Byzantine managed care, post ACA medical regime where there's bills going out, bills coming in, everybody who has been through the health care labyrinth understands that there are delays, there are explanation of benefits? There's this entire Byzantine architecture of health care billing. All of us have navigated it in our personal lives.

What -- what should this Court look at in deciding what is material in a system that includes paperwork, reimbursements, overpayments, all the paperwork that's going in and out of these various agencies and reimbursements, like what is the lynchpin of materiality? What's the statutory and jurisprudential lodestar for the Court?

MS. HACKER: So it goes back to the fact that the Medicaid providers are required to be in compliance and certify their compliance with all the state laws and regulations. And there is that requirement because of the fact that Your Honor mentioned because providing these services is very complicated.

It -- you know, it's difficult for the government to have enough resources to verify that everyone is following all of the rules and all of that. And so it places the burden on the provider to continually certify that they are in compliance with all of those requirements.

Now, there could be an argument that you know there may be some technical requirements that might not be material if the state continued to reimburse the Medicaid provider even though that requirement wasn't being met. I think that presents some complications in terms of what the False Claims Act is designed to do and the burden it places on the provider. But nevertheless, assuming that that were true, we know that these facts here were material because as soon as the states discovered them they terminated both -- in both states. They terminated Planned Parenthood in both states.

So those were material conditions of payment according to Texas and according to Louisiana.

THE COURT: Okay. So in searching for guidance and materiality, the Court identified out-of-circuit authority in United States and Harrison vs. Westinghouse. So this is 352 F.3d 908. There, the Fourth Circuit explains that the tests for determining materiality is whether the false statement has a natural tendency to influence agency action or is capable of agency action on the potential effect of the false statement when it is made, not the actual effect of the false statement

when it is discovered.

And when the court in the Fourth Circuit it further explains, quote, "Courts give effect to the FCA by holding a party liable if the false statement it makes in an attempt to obtain government funding has a natural tendency to influence or is capable of influencing the government's funding decision, not whether it actually influenced the Government not to pay in a particular case."

Is this an accurate restatement of plaintiffs' understanding of materiality and how this Court should give weight to any continued payments that the government made post-termination?

MS. HACKER: So Your Honor, the way -- the way that I would interpret the language that Your Honor just read is that even if the -- even if the government continued to pay the claims, if it was something had they known they would not have, that would be sufficient to show materiality. But we don't even have to make that leap here because we know what would have happened once they found out they did terminate them for those reasons. So there should be no question that those were material to continued payment.

THE COURT: Well, with regards to one of the affiliate defendants here, specifically, Planned Parenthood Gulf Coast -- so I'll refer to this party as PPGC -- couldn't a reasonable juror find that based on PPGC's current enrollment

in Louisiana Medicaid, despite the state's knowledge of the facts that caused the termination, that nondisclosures made by at least that affiliate defendant were not material, they weren't material enough to cause a discontinuation of Medicaid services? How should the Court weigh that and also how should the Court determine if this is a fact issue for the jury at this MSJ phase?

MS. HACKER: So Your Honor, if a provider is excluded from Medicaid, they can reapply to participate and the fact that here Planned Parenthood was excluded from Louisiana Medicaid for several years, I believe, from 2015 until November of last year, that was a severe penalty for a provider for the issues that Louisiana found in the termination letter were sufficient to terminate them from the program. So the fact that seven years later the state decided that they had had enough punishment and was going to allow them back in based on their representation that they would follow the rules, that doesn't necessarily mean that those things were not material to their termination seven years before. That's just the state's exercise of its discretion to allow them back in if they've claimed that they've -- you know -- have rectified the problems that were there previously.

THE COURT: So I think I have your answer now on Louisiana and its various termination and Medicaid enrollment decisions. What about Texas? So here, there was a grace

period extended. I have a briefing from plaintiffs that this Court should not infer too much from the grace period and exhibits that plaintiffs argue reflect that defendants abused the grace period, does it matter that, you know, there's e-mails reflecting that certain defendants or at least actors representing those defendants wanted to milk a few more stories? I think you called out some of those e-mails here. Does it matter that those alleged misrepresentations did not directly correlate to the claims for reimbursement?

So to the extent that there is a disconnect between the internal evidence reflecting an ulterior motive for continued operations on the part of various defendants, does it matter that that does not directly relate to the stated basis for certification or claim for reimbursement? Does that mismatch matter, and what is the Court to do with materiality analysis during this grace period where plaintiffs have now presented evidence that there was an ulterior motive, and again this is plaintiffs' argument. What am I to do with the Texas decisions during that grace period and the materiality analysis where your evidence doesn't necessarily match the basis for reimbursement?

MS. HACKER: Yes.

THE COURT: Does it matter?

MS. HACKER: Yeah. Just going to pull up those documents real quickly.

THE COURT: So I have in the exhibits that are in the record, they were attachments to briefing, a series of e-mails reflecting defendants' internal discussion of various termination points, whether the pursuit of administrative remedies, what was the relevant tolling event, for lack of a better term, but I don't see a lot of connective tissue between the correspondence in those e-mails and the basis for Texas and Louisiana terminating defendants. You know, whether they had, you know, a media component to their decision making, an administrative law component, I don't see exhibits that reflect a cover-up or anything that directly relates to those videos that -- or the lynchpin of the termination decision. Does that matter for materiality analysis when I'm weighing the e-mails that were disclosed during discovery and attached to relator's briefing?

MS. HACKER: So I would think of the claims during -- if I understand Your Honor's question correctly -- I would think of the claims during the grace period as different than the claims that were made between 2011 and 2015, in terms of the falsity of those claims. So for example, in the -- in the letter that PPFA drafted and the affiliates sent to Texas, they requested a grace period of reimbursement for the benefit of their patients so they could transition the patients to another provider.

And then, Texas, in turn, granted a one-month grace

period for that express purpose of ensuring that current Medicaid clients receiving services at your clinics can be transitioned to new providers. So I think the way to look at this is, you know, the Medicaid program itself is sort of a contractual agreement between the provider and the state. The state agrees -- or the provider agrees to provide certain services in accordance with rules and regulations, and in exchange, the state agrees to reimburse the provider for those services that are provided.

Here, this is essentially kind of a contract where the agreed upon basis for reimbursement was to allow Planned Parenthood to transition their patients to other providers during the 30-day period that Texas gave them.

Now what the evidence then shows is that they made virtually no effort to do that. Instead, they tried to get as much Medicaid revenue as possible. Only if a patient came into the clinic and tried to schedule another appointment were they then told actually we're going to be out of Medicaid in a month. So the express purpose that the Court -- or that the state allowed them to even do this, they did not fulfill that condition of the agreement.

And so by asserting that they needed this period to transition their patients and then not doing that, that assertion they made to the state was the false statement.

THE COURT: Okay. Thank you for that clarification.

I have your argument on that point.

I now want to turn to the portion of defendants' briefing to this Court construing the actual clause-by-clause text of Section 3729(a)(1)(G). Somebody on defendants' team purchased a copy of Scalia and Garner's Reading Law Manual, and I say that with all affection. Justice Scalia was my professor at one point during a summer course. So I recognize this type of argument, this aversion of textualism, and it's an argument I don't see in any of the available FCA analysis, at least at the circuit level.

So here there is a -- a novel argument that Section 3729(a)(1)(G) Clause 1 includes the term causes, but Clause 2 does not. Is PPFA correct that it could not be held liable for causing affiliates to submit false claims under Clause 1? This would be the implied false certification theory but not for causing the reverse false claims which would arise under Clause 2. And I don't know of any canon that Justice Scalia would use to resolve this jump ball, but that is an interesting argument. I could not find an analogous circuit opinion in or outside the Fifth Circuit. So I'll give you opportunity to argue your textualism case for how this Court should deal with this post-2009 reconstruction of this clause.

And for record purposes, you can refer to Clause 1 and Clause 2. I think all attorneys in the room, the clerks and the Court will know what you're referencing, and that may

make life easier for my court reporter who was not a false claims expert before today. So you can refer to Clause 1 and Clause 2, and tell me what I'm supposed to do with this proposed textualist analysis of that causation language.

MS. HACKER: Yes, Your Honor. I believe that the defendants' argument is that PPFA cannot be held directly liable under Clause 2 because it did not itself have an obligation to repay. And there's the Fifth Circuit precedent of Caremark that the court affirmed the theory of indirect reverse false claims liability. And so I don't believe -- I don't believe there is any further case law examining this purported distinction because, to be frank, it doesn't really matter.

The statement that the Fifth Circuit made is still true because that second clause of 3729(a)(1)(G) states that it's -- to avoid or -- you have liability for avoiding or decreasing an obligation to pay, not your obligation to pay. So it doesn't necessarily have to be the obligation of PPFA. If they avoided or decreased someone else's obligation to pay, then that would satisfy the plain language of that second clause.

THE COURT: Okay. So as an Appellate Division AUSA, I had to wrestle with a line of cases written by Justice Scalia dealing with various constructions of proceeds and money laundering statutes and the rest. And there were instances

where Justice Scalia would invoke the rule of lenity to resolve an ambiguity. Here, if there is an ambiguity between Clause 1 and Clause 2, and whether causation analysis properly affixes to Clause 2, is there a canon in that book that I can flip to that decides who wins the jump ball?

MS. HACKER: So if Your Honor is asking about whether the word "cause" should be imputed to the second clause, I think that that is dispelled -- and forgive me, I just switched off that slide but I'll get back to it.

THE COURT: And I understand the Caremark argument --

MS. HACKER: Yeah.

THE COURT: -- versus causation, but is there a canon that tells me what to do when we have quasi-criminal liability -- and I know this is a statute that sort of lies at the estuary between, you know, mixing criminal and civil concepts -- but is there any sort of canon that dictates to the Court how to resolve this in a False Claims Act case? If it were pure criminal law we would invoke the rule of lenity, I would be ordered to put my thumb on the scale favoring defendant for all the reasons known to counsel. Is there a similar canon or rule of construction the Court can invoke or look to in deciding a potential ambiguity in this quasi-criminal statutory context? I couldn't find one, so I'll be candid. If you know of one, if you have find -- if you can find analogous case law that helps, that's what I'm inviting

now. Is there any sort of textualist analysis of similar statutes where we have, you know, an element like causation in Clause 1 but not Clause 2? Are there any canons the Court should look to to resolve this, or are we just dealing with Caremark and other FCA case law?

MS. HACKER: Your Honor, I think as to whether causes should be imputed to the second clause, I think that you don't have to look any farther than the word "or." The word or in between Clause 1 and Clause 2 disjoins those two clauses and so the plain reading is that each clause stands independently on its own. And as far as a canon, I can't think of one right now but I can't remember the name of the case but I know there was a fairly recent Fifth Circuit case where the court did a textual analysis of a criminal statute and I believe the use of the words "and" and "or" may have played into that decision but I can't remember all the details.

THE COURT: Disjunctive versus conjunctive.

MS. HACKER: Yes.

THE COURT: Okay. So any post-2009 cases that find the sort of indirect liability for a Clause 2 reverse false claim if that's available to either counsel for plaintiffs or defendants -- I'll instruct almost like a 28(j) letter -- you're allowed to submit supplemental briefing on that. That will be an exception to the standing orders on the briefing schedule. So this is open to either side. If there are any

post-2009 claims that give additional analysis maybe after, you know, the Supreme Court has now decided, shoot, I'll instruct counsel to advise the Court of those cases.

So I'm not going -- I'm not going to make you argue in a vacuum anymore on that textualism point.

MS. HACKER: Okay.

THE COURT: So some of your arguments in this -- in this category of control in what PPFA did vis-a-vis affiliates caused the Court to consider the various standards for sanctions. So if the decision to steer affiliates away from administrative appeals, and the various legal decisions that are reflected in the e-mails submitted as evidence, would any of that conduct be sanctionable under Rule 11B or other sanction rules that we have in federal court? If it doesn't rise to the level of a sanction and there was never any motion for sanctions, do you still have theory of fraud? I think the answer is yes, but here I have arguments from both plaintiffs that the decision to steer away from administrative appeal crafting the request for the grace period, the filing of the lawsuit in Travis County District Court, those e-mails are to -- plaintiffs asked this Court to construe those as relevant to scienter, knowledge, that there is an evasion or an aversion of legal requirements. If all this is going on, is any of this sanctionable and what should the Court make of the fact that nobody got sanctioned for doing any of those?

MS. HACKER: Your Honor, before I begin my answer could I get a time check, please?

THE COURT: Oh. 25 minutes remain.

MS. HACKER: Of the hour and 15 minutes?

THE COURT: That's correct.

MS. HACKER: Thank you.

So I think that the filing of a baseless lawsuit I suppose could be sanctionable. The avoiding -- giving a relevant update to a federal court, specifically the federal court in Louisiana, and when presented with the question of whether the legally baseless injunction should remain not being candid with the court and the fact that that injunction was legally baseless, that could also be sanctionable. But whether or not the parties in those cases asked or did not ask for the attorneys to be sanctioned in those cases, I don't believe that that has any relevance on their culpability under the False Claims Act.

THE COURT: Okay. So the Court shouldn't infer too much from the fact that nobody filed for sanctions and this could also be a function of discovery. Nobody knew of these sort of reasons for filing suit until we got into discovery. So, I just added a note on sanctions but it doesn't sound like it's of much import in this case.

So moving to the tail end of the pending motions and complaints, let's talk about the conspiracy claim. I don't

believe Texas has joined this claim so I believe that you're the correct attorney to answer the question. It's the Court's understanding that relator can prove defendant shared specific intent to defraud the government through circumstantial evidence, that that must be established by clear satisfactory and convincing testimony. If you had to point to the clear satisfactory and convincing testimony as a smoking gun in this case, where would you direct the Court's attention in the Court's analysis of the pending conspiracy claim?

MS. HACKER: So I would say, Your Honor, that -- I wouldn't say that there is just one smoking gun here related to conspiracy. I would say that it's more instructive to look at the evidence as a whole in terms of PPFA's coordination and work with the affiliates. From way back even before there was a final termination notice in either state, so as far as back as 2015 all the way through the present, PPFA was involved with everything that the affiliates did to try to avoid their obligation to repay. They were right there alongside them.

And, you know, we know how closely from all of the evidence as well, we know how closely PPFA controls the operations of the affiliates. But even more specifically, PPFA was involved in this -- in dealing with this defund effort as a national organization, there was a national response to this.

And I think perhaps some of the most pertinent evidence of that is that PPFA advised the affiliates to not

challenge their terminations in the state proceedings because it was better for the alliance or the affiliation -- or the affiliated -- sorry, what am I trying to say -- the federation -- it was better for the federation as a whole that they stick together even though that was plainly against the interest of the individual affiliates.

For example, there was testimony from Pauline Barraza from PPST that she did not believe -- they were -- they were not featured in the video. She did not believe that it was correct that they would be an affiliate of PPGT or PPGC. Yet they did not challenge that conclusion. That was the basis for them being terminated. They didn't challenge that conclusion because PPFA said it would not be in the interest of the federation as a whole.

So this was a coordinated effort between all of them, everything that happened after that was as a result of this coordination.

THE COURT: Okay. And so that we can get through the remaining two bullet points in the Court's schedule or itinerary for this argument, give me your best argument on excessive fines under the Eighth Amendment. You know, of course, this is not assuming anything of the Court's decision on summary judgment, but looking forward to Eighth Amendment issues, excessive fines and using criminal law terminology, does the Court have discretion to downwardly vary, or is this a

statutory minimum that must apply as a multiplier in every case where liability affixes?

MS. HACKER: Your Honor, I do not see any -- in the plain text of the statutes I do not see any discretion to adjust the civil penalties or the damages. Those amounts are set in the statute in terms of there is a minimum. So a penalty per claim cannot go below the minimum just according to the plain terms of the statute. And as far as our best argument as to excessive fines I think the Court need not look past binding Fifth Circuit precedent in the Newel case, Newel vs. USEPA 231 F.3d 204 at 210. The Court said there no matter how excessive in lay terms the administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not author -- the fine does not violate the Eighth Amendment.

And I think a lot of the complaint as to the potential penalties here being an excessive fine relate to the overall amount of the penalty but that's not necessarily the way that you would analyze this for Eighth Amendment purposes. You look at the penalty per claim, and $12,000 as a penalty can certainly not be considered excessive. Multiple federal courts have analyzed fines in that way.

And that's in keeping with that precedent. As well, even though several courts have been asked, multiple appellate courts have upheld large fines under the FCA, and there is no

opinion, no federal court opinion or Texas opinion or Louisiana opinion for that matter -- finding that fines and penalties under these statutes violate the excessive fines -- or violate the Eighth Amendment --

THE COURT: Okay. So in researching that issue prior to the hearing, the Court identified some out-of-circuit authority. Should we ever reach this point, I'll likely order additional or supplemental briefing and I want counsel for both plaintiff and defendant to be aware of these out-of-circuit authorities. The Gosselin case, G-O-S-S-E-L-I-N, 741 F.3d 390, the Yates vs. Pinellas Hematology case, 21 F.4th 1288, that's an Eleventh Circuit case from 2021. And then, also, Mackby, M-A-C-K-B-Y, 261 F.3d at 821. So I know there are many more summary judgment issues and arguments to address but just as a preview for potential supplemental briefing, the Court is trying to do the analysis on what the Eighth Amendment requires and how we define the relevant multipliers and denominators in arriving at that result, and if necessary, how that should be charged to a jury.

So those are some cases that came up in the Westlaw search. You should add those to your inventory of Eighth Circuit research cases as well.

So I believe that brings us to the end of the identified questions. Counsel are instructed to address, specifically, pretrial publicity, national and local

advertisements, potential jury pool taint. Does counsel for plaintiffs propose any least restrictive means as a corrective measure or, if this case goes to jury, is a potential taint of the jury pool addressable through voir dire?

MS. HACKER: Your Honor, before I begin to answer that question, I just want to note that the -- I don't know what's going on with this -- that the fine -- or the cases that Your Honor mentioned in relation to excessive fines, I am familiar with those cases and I can discuss them today if you want me to.

THE COURT: Okay. Let me give you a final time check so that I get your answer on that last point.

MS. HACKER: Okay.

THE COURT: Yeah. So you have 15 minutes remaining. You can allocate your time as you see fit.

MS. HACKER: Okay. I'll go ahead and answer the pretrial publicity question first, and then I can turn to the excessive fines issue and discussion of those -- those precedents.

So we are aware that Planned Parenthood has been engaging in advertising in the local area of the court.

Brian, if you could -- my understanding is that this is a billboard that is placed here locally in Amarillo. Now, as the Court mentioned, there are some measures that the Court can take that are looked at as least restrictive measures that

can control extensive publicity and limit potential jury pool taint. As the Court mentioned, that would be thorough voir dire, detailed jury questions, sequestering the jury. Other more restrictive measures would include a gag order on the parties and counsel. A gag order on the press or restricting access to proceedings. Those latter two options I think are draconian and are probably not warranted in a civil case.

The Supreme Court has allowed gag orders on parties and lawyers before, but those do have to satisfy strict scrutiny according to the Fifth Circuit. Such orders can only be imposed if the Court determines that extra-judicial commentary by those individuals would present a substantial likelihood of prejudicing the Court's ability to conduct a fair trial, and it would have to be narrowly tailored in the least restrictive means available.

THE COURT: This is why I gave you that terminology. The last time I was an attorney on the other side of the bench in this courtroom I was an AUSA. It was a National Security Division case involving Foreign Intelligence Surveillance Act materials and we did have a gag order in place. And I'm assuming I'll also hear from defense counsel that neither party is asking for something as draconian as a gag order. But I am familiar with that extreme in a very different setting, in a National Security Division setting. But I did want to invite argument from both parties should this case proceed to trial.

So I think I have your argument on that. If you want to pivot back to some of the excessive fine Eighth Amendment points you wanted to address.

MS. HACKER: Yes, Your Honor. The cases that the Court mentioned: Yates, Bunk, Mackby, all of those cases support and actually refute the defendants' arguments that the government wasn't really harmed here, and that's why the fines were excessive.

So in particular, the Bunk case stated that: "For purposes of our Eighth Amendment analysis the concept of harm need not be confined strictly to the economic realm. The prevalence of contractor scams shakes the public's faith and the government's competence, and may encourage others similarly situated to act in a like fashion. We made the proper point 50 years ago. No proof is required to convince one that, to the government, a false claim successful or not is always costly. Just as surely against this loss the government may protect itself, though the damage be not explicitly or nicely ascertainable."

And as a further example there, the Bunk case actually awarded zero dollars in damages, but over a million dollars in penalties. So as a proportion the penalties were a million times what the damages were there.

In the Yates case similarly the Court awarded $755 in damages and $24 million in penalties. And also explicitly

rejected an excessive fines argument. The Yates case also states that because we are only asking for the statutory minimum here, the penalty is given a strong presumption of constitutionality. And as far as the issue that I mentioned earlier with respect to whether you look at this as a total award or whether you look at this on a per claim basis for the Eighth Amendment analysis, those cases that I just mentioned also support that argument.

In addition I would point the Court to U.S. vs. Tuomey, which is a Fourth Circuit case, 792 F.3d 364. In that case the court said, "While the penalty is certainly severe, it's meant to reflect the sheer breadth of the fraud perpetrated upon the federal government."

In the case that the Bunk case was referencing earlier, the Toepleman case from 1959 in the Fourth Circuit, the court said, "For a single false claim the civil penalty would not seem exorbitant. Furthermore, even when multiplied by a plurality of impostures, it still would not appear unreasonable when balanced against the expense of the constant treasury vigil that they necessitate."

And the Bunk case as well looks at this exact issue and says, you know, "It's inevitable, in view of the vast number of government contracts, many of prodigious size and sophistication, that we would confront FCA actions involving thousands of invoices, thus exposing culpable defendants to

millions of dollars of liability for civil penalties. We are entirely comfortable with that proposition."

So the case law that the Court mentions, I think, in addition to other case law that I have just outlined, supports the argument that the damages and penalties here in civil remedies under the Texas Medicaid Fraud Prevention Act are not violations of the Eighth Amendment.

THE COURT: Okay. And was the Gosselin case from the Fourth Circuit in your briefing to the Court?

MS. HACKER: I don't recall, Your Honor.

THE COURT: Okay. Well, I wanted to apologize because I think I stated that it came up in the Court's independent research. If that was in your briefing, I missed it. So with apologies to counsel if you already had Gosselin in your inventory of cases. But that's -- that is a case that the Court was aware of and is looking at. So with that I'll allow you to close with any arguments on your portion, and then of course Mr. Wassdorf has reserved 15 minutes.

MS. HACKER: Your Honor, with that I think I will pass the podium to Mr. Wassdorf.

THE COURT: And am I pronouncing your name correctly?

MR. WASSDORF: Yes, Your Honor.

THE COURT: Okay. Mr. Wassdorf, you may approach the podium. How about we take a brief five-minute break to allow you to set up to allow for any breaks and refreshments. If

counsel require water you can always have that at the table, but this'll be a good natural break. We'll resume with Mr. Wassdorf's argument at 11:30. So I'm feeling generous today. I'm going to give you ten minutes with all the attorneys we have assembled, and all the bottles of water and the small restroom facility we have, we might require ten minutes. So please return. The Court stands in recess until 11:30. Counsel are instructed to reappear at that time.

(Off the record at 11:21 a.m.)

(On the record at 11:41 a.m.)

THE COURT: And, Mr. Wassdorf, you may proceed.

And again the Court is back on the record, case Number 2:21-CV-022-Z, for continuation of the hearing on the pending motions for summary judgment.

Mr. Wassdorf, you may proceed and you have 15 minutes.

MR. WASSDORF: Thank you, Your Honor.

There is no one that knows this case, the evidence or the law better than Ms. Hacker, and so I'm not going to stand here and pretend to be able to better inform you of -- about the case. However, Your Honor, I do believe Texas has a unique perspective in this case that cannot be forgotten. We are joined in this room by an army of lawyers. There are many parties in this case, two states, the federal government and so many statutes I can't even remember at this point.

But from Texas' perspective, this is a very simple case. Planned Parenthood and its affiliates were terminated as providers under the Texas Medicaid program. They chose not to appeal that decision. Yet in the preceding months -- or succeeding months and years they continued to bill Texas Medicaid 45,181 times for a total of $8.9 million. To date, not a single one of those claims has been repaid.

That by the basic facts meets the requirements of the reverse false claims theory of liability under the Texas Medicaid Fraud Prevention Act and this Court should find so. A couple of specific things I did want to point out. As this Court has already recognized, the TMFPA is a simpler statute than the FCA. It does not include the materiality requirement that the FCA does and so that analysis is not required here.

With respect to the Court's questions regarding control, the provision of the TMFPA we're talking about here doesn't require control. It requires someone to avoid or decrease an obligation to pay, not their obligation to pay. And so I think that can get around the control issue to some extent. To the extent that PPFA caused to -- caused the affiliates to either avoid or decrease the repayment of their obligations, PPFA is equally liable to that of the affiliates.

A couple of other points that the Court raised that I wanted to clarify is, you know, on the excessive fines issue, Ms. Hacker has already spoken on that, but I just wanted to add

that likewise to the case law regarding the federal False Claims Act, there is no case law that has been applied in Texas that would find any fines under the TMFPA to be excessive.

THE COURT: And that was one of the questions.

MR. WASSDORF: Yes, sir.

THE COURT: I know counsel for both Texas and relator were tasked with being prepared for the nine issues identified in the Court's order, and I intended to ask Texas specifically if there were any controlling Texas Supreme Court cases Eighth Amendment analysis to its statute. I'm assuming from your representations to the Court that the Texas Attorney General's Office is unaware of any authority applying Texas law in an Eighth Amendment context to disallow the trebling of damages or any of the multipliers that would apply under the Texas statute, is that correct?

MR. WASSDORF: That is correct, Your Honor. And in re Xerox, the Court didn't directly address the Eighth Amendment, but it did point out similar to the federal case law that Ms. Hacker has cited, that the remedy here is not related to the loss to the state -- the monetary loss to the state, but is related to the fraud itself. And as Ms. Hacker pointed out to the Court, that a $12,000 penalty for a single fraudulent claim is not excessive pursuant to the Eighth Amendment.

The last issue that I wanted to point out to the Court is the way that relators have sought judgment in this

case. I just wanted to clarify, they have sought judgment accounting for the relator's fee and the attorney's fees. Texas believes that that is proper in the post judgment context and that the judgment, if the Court were to grant judgment, should be for the full amount to the state of Texas and that we would then address the relator's share and attorney's fees in post judgment proceedings.

THE COURT: And should the Court determine at the summary judgment phase that it can decide liability on the pending claims by plaintiff and relator, is there a way to divide that damage award at the summary judgment phase and allow certain claims to proceed to jury trial, for example, reimbursing to Texas the amounts owed on the face and then a jury doing the work on FCA damages. Is there any division of damages that you could foresee or invite from this Court at this summary judgment phase, or is all of that done in post judgment briefing or argument to the Court?

MR. WASSDORF: I believe that Texas' claims stand alone here and could be entirely determined at summary judgment.

THE COURT: Okay. And make your best case for why the Court could follow that division of labor at this summary judgment phase.

MR. WASSDORF: Your Honor, I do not have a case that supports that.

THE COURT: So you'd just be relying on the statutory text and how different elements arising under that Texas statutory regime differ from the arguments I've heard from Ms. Hacker on the federal version of that statute?

MR. WASSDORF: Yes, Your Honor.

THE COURT: Okay. So you're standing on the statutory text. Okay. I'll invite argument from Texas on any of the remaining nine issues reflected in that ECF Document 513, the order setting hearing. Are there any other Texas centric or Texas specific arguments that you would present to this Court that differ from the briefing and argument received from Ms. Hacker?

MR. WASSDORF: No, Your Honor. I'm just looking at my points regarding the Court's points and I think we've covered that largely. With respect to the obligation to return overpayments, I just wanted to point out that the Texas Medicaid provider manual, the provider agreements themselves that the defendants entered into, state regulations and the state statute all obligate Planned Parenthood to return any overpayments, which is a number that they have not contested, the number of claims and the dollar amount that the expert in this case has identified. I'm sure they would disagree over -- whether that obligation exists.

THE COURT: Yeah, as a function of liability. But as a function of just arithmetic, the parties are not in

disagreement about the claims submitted, the numerosity of that, there's no disagreement on that basic arithmetic.

MR. WASSDORF: Correct.

THE COURT: It's just a disagreement about the legal theories of liability, the facts that are briefed to the Court. But nobody disagrees on the claim number and what that starting number is, is that correct.

MR. WASSDORF: Correct, Your Honor.

THE COURT: Okay. And anything else that distinguishes the Texas statute from the federal statute, and your argument from Ms. Hacker's? Anything regarding scienter, the mental state required, anything that would set apart Texas' argument from what I have from relator in this case?

MR. WASSDORF: The definition of "knowingly" does vary slightly from that in the False Claims Act. I'm not sure that it's material. There is no case law interpreting that difference, you know, knowledge versus -- in the TFMPA versus actual knowledge under the FCA. And then I believe it's conscious indifference versus --

THE COURT: As often the case in our federal system where there's a federal statute and a state statute that mimic each other, is it correct that for the most part the Texas Supreme Court has echoed federal FCA jurisprudence in construing the clauses of the Texas statute with the exception of materiality, is that correct?

MR. WASSDORF: They -- it has been recognized as an analogous statute but not identical. Where the language differs materially it should be interpreted differently.

THE COURT: Okay. And I think you've already identified materiality analysis, correct.

MR. WASSDORF: Yes, Your Honor.

THE COURT: Okay. So I'll allow you your final five minutes to wrap up, but I think this -- this case was well briefed by all counsel involved. I think I understand the differences between your brief and Ms. Hacker's. Anything else you would want to close with? You may do so at this time before the Court anticipates a break for lunch.

MR. WASSDORF: We'll reserve any additional time for rebuttal, Your Honor.

THE COURT: Okay. Thank you, Mr. Wassdorf. You may return to counsel table.

At this point, I will excuse the parties and counsel for a lunch break. As directed, the defendant may reconfigure this courtroom in whatever form suits your argument. You may avail yourself of courtroom technology. Just be mindful of the sight lines that apply to opposing counsel so they have view of anything that's presented on screen. I'm going to allow for an hour-and-a-half lunch break, and you will have access to this room for the duration of that break to reconfigure the courtroom. I'll instruct defendants' counsel to confer with my

law clerks about ECF numbers and pages to make certain when you're calling the Court's attention to a document by ECF that it's matching the same numbering system that we're using at the bench here.

So with that final instruction, I'll dismiss counsel and the parties for the lunch break, and you are ordered to reappear promptly at 1:30 for the remainder of this summary judgment hearing.

(Off the record at 11:56 a.m.)

(On the record at 1:36 p.m.)

THE COURT: The Court is back on the record in Civil Case Number 2:21-CV-022-Z for continuation of the hearing on the pending motions for summary judgment.

At this time, defendants may approach the podium or they may argue from counsel table, whatever's most comfortable. And who will begin for the defendants?

MR. MARGOLIS: Thank you, Your Honor. I am Craig Margolis. I will begin for the affiliate defendants. Like our colleagues on the plaintiffs' side, we have some slides, if I could hand up --

THE COURT: Okay. You may approach.

MR. MARGOLIS: -- copies.

We may not look at all of these, Your Honor, in the course of the argument but we'll flash the ones certainly on the screen that we will refer to.

THE COURT: Okay.

MR. MARGOLIS: And in terms of housekeeping, Your Honor, I intend to take 90 minutes -- well, let's put it this way: No more than 90 minutes. I would ask that we would reserve 30 minutes for my colleagues from the federation to make whatever arguments are appropriate. My arguments will be directed largely to the affiliates, but of course insofar as they apply to the federation as well, then, you know, we would ask that you consider those as arguments.

THE COURT: And then for the federation this would be Mr. Metlitsky.

MR. MARGOLIS: Yeah. It's Mr. Metlitsky and perhaps Mr. Ashby to talk about pretrial, some of the issues of pretrial publicity that you raised in your order.

THE COURT: And are you asking a time check?

MR. MARGOLIS: Yes, please, Your Honor. And if it's not too much trouble, may I have two? One at 60 minutes and one at 75 minutes.

THE COURT: Okay.

MR. MARGOLIS: Just to make sure, I want to make sure of course I cover everything that's of interest to Your Honor.

THE COURT: Okay. So the clerk will keep the time and we'll apprise you of those -- of those time intervals. You may proceed.

MR. MARGOLIS: Thank you, Your Honor, and may it

please the Court.

So, Your Honor, first, let me begin with first principles. We are not here on a recoupment action. We're not here on a restitution action. We're not here because the plaintiffs are seeking recovery on an injunction bond which of course was never existed. We're here because this is a False Claims Act case. I think Your Honor put it very well, this is quasi-criminal. It's in the estuary between the civil law and the criminal law, and, frankly, Your Honor, it's an awfully salty estuary at that. This is an estuary where we're talking about exposing the defendants to -- putting aside for a moment the question of collateral consequences of which there can be many for enrolled Medicaid providers, but we're talking about the prospect of punitive penalties that the plaintiffs have requested in excess of a billion dollars from these nonprofit entities. And then the question comes for what conduct.

Let's start with the Reverse False Claims Act claim. The conduct here is that the defendant affiliates, pursuant to court orders in Louisiana, and that's PPGC specific, Your Honor, and in Texas for all three of the affiliates, saw -- I'll give a ballpark number, Your Honor -- thousands of needy Texans and needy Louisianans. I'll say Louisiana citizens in case I'm mispronouncing.

Saw those patients, provided they're eligible patients, no dispute. Medicaid beneficiaries. Eligible

services, no dispute; cervical cancer screenings, STD treatments, well-health visits, medical treatments are all covered by family planning provisions in the Medicaid act. And did so only during the pendency of injunctions or with respect to Texas, a grace period allowed by the state. That is what the plaintiffs are alleging, that it was fraudulent when the court later, and talking about Kauffman, which we'll get to, of course, Your Honor, a little more detail later, when the Fifth Circuit en banc made a ruling, not on the merits of the underlying dispute but whether there's a prior rate of action under Section 1983 to enforce free choice of provider.

That when the Fifth Circuit then vacated those injunctions and after the expiration of any other court orders in Texas, there appeared an obligation to pay the money back absent any request from the state that subjects the affiliates to penalties and liability at fraud for not paying that money back.

And in Louisiana, as we'll talk about in a little more detail, Your Honor, there was never a termination before the terminations were withdrawn by the state.

It might be helpful, Judge, we prepared some timelines. I think you had asked previously about timelines and we have a couple. Again, you know, we may or may not refer to them in the course of the argument, but I wanted to provide them for your reference. It's actually Slides Number 1 and 2.

One is for Texas and one is for Louisiana. And maybe we can leave the Texas timeline up there if it's all right with Your Honor while I argue in case there's something that's relevant as a reference for the Court, there will be some other slides as we proceed.

THE COURT: You may use the demonstrative that way.

MR. MARGOLIS: Thank you, Your Honor.

So let's start of course, as we always should, I know you had referenced Justice Scalia with what the statute actually requires and we're talking about now the Reverse False Claims Act. So what are the problems with the plaintiffs' theories that entitled the affiliates to summary judgment? I believe we would have agreement, Your Honor, that they cannot proceed under either the Texas False Claims Act -- sorry, Reverse False Claims Act, frankly, the Louisiana state False Claims Act equivalent, or certainly the federal False Claims Act, if the providers were not terminated which is in the case of Louisiana. There's certainly no obligation to pay the money back. And then in the context of Texas the question would then become, which I think is -- there's no dispute, that any services were provided after the terminations in Texas.

So the question is before the terminations took place, was there any obligation to pay the money back?

What I heard from the state in particular was not even a mention of the word "injunction" during the state's

argument, treated as if there was never a court order, that my clients were providing services when they had already been terminated from Medicaid. The relator's counsel mentioned the injunctions but paid them short shift. The injunctions, Your Honor, are not an esoteric legal concept. They're not a legal construct. The injunctions are fact and we're here on summary judgment. These injunctions actually existed as a matter of fact.

I will use a -- well, actually, let me get back to that for a second. But it's not as if these injunctions magically disappeared as if they never took place which seems to be something upon which the Texas and the relators must rely. In order for this Court to proceed, the Court would have to find that it's as once Kauffman en banc issued its decision and its mandate. It's as if the injunctions as a matter of fact never happened.

I think you had started, Your Honor, by asking my colleague on the relators side, what's their best case for a circumstance remotely like this. There isn't one. I mean, Your Honor, I hesitate to ever represent in case in the millions of cases that exist out there in the ether that there might be something, but we looked pretty hard and we haven't found a single case.

THE COURT: So I think -- I think I mentioned -- I think I mentioned Arkadelphia, so there the Supreme Court and

again I know this opinion is now over a century old. The court there said, quote, "A party against whom an erroneous judgment or decree has been carried into effect is entitled in the event of a reversal to be restored by its adversary to which he is lost thereby." Arkadelphia appears throughout the briefing.

Is it your case that because a bond didn't issue or there was an absence of an injunction bond, that the statutory entitlement to recover overpayments is suspended for the duration of that injunction as long as a bond doesn't issue? I mean are you leaning on that branch, or is there -- am I misunderstanding the way this was briefed to the Court?

MR. MARGOLIS: No, Your Honor, you're correct. But in part. So let me make sure and of course, Your Honor, if it -- if there's anything that we've imparted in the briefing, it's -- it would be it's not clear, then that's something of course I want to -- that's our fault and I want to correct.

It's in part true, Your Honor. I mean there is a case that we've cited from the Fifth Circuit that says in terms of an action for damages the -- if an injunction is preliminary injunction is later vacated, that the damages are limited to the amount of the bond. And here, Your Honor, there were no bonds issued. The state -- actually, Mr. Stevens on behalf of the state, asked Judge Sparks for an injunction bond only in the amount of $300,000, I believe it was, Your Honor. Perhaps $350,000.

And it was denied because Judge Sparks found that these Medicare beneficiaries would -- Medicaid, excuse me, beneficiaries would receive services from some other providers so the state wasn't financially harmed.

In Louisiana the state didn't even ask for an injunction bond. Now, there is that line of cases -- if there was an injunction bond there are cases that say that damages are limited to the amount of the injunction bond.

Arkadelphia stands for something different. That's restitution. That was an older case probably in a case before there was a complete merger of law and equity. But that case is talking about the equitable remedy of restitution. It's obviously not a False Claims Act case.

And in Arkadelphia, what the court held is that there is the ability to seek restitution. Potentially independent and apart from an injunction or an action to recover damages on an injunction bond. But a restitution action, as Your Honor well knows, is very different from the False Claims Act case and why it matters is that it's contingent. There are equitable arguments that come into play -- if we were here on an action for restitution, Judge, which of course the state never brought, very important to note. The state, which has of course been aware of the circumstances from the start, never brought an action for recoupment, never brought an action for restitution. Louisiana, the same.

But if we were here on a restitution claim, Planned Parenthood would have any number of arguments as to why there shouldn't be restitution. Not the least of which is that it continued to see patients and provided covered services and that the state would reap a windfall if those monies had to be paid back. The point, though, Judge, is because we're not here on a restitution action, we're here on a False Claims Act case, the point which we'll get back to, is that the Reverse False Claims Act requires an established obligation.

THE COURT: And that was going to be my next question because in the papers and in the argument, plaintiffs here discuss this established duty to return overpayments. What else was needed to create a duty in this context? So if plaintiffs are incorrect that this is a statutory duty and the burden falls on the providers under a reverse false claim, what else other than a termination letter, what else is required before this Court can find that you did have an established duty?

MR. MARGOLIS: Well, Your Honor, I think I would answer the question this way: There's nothing in the termination letters themselves that speak whatsoever to recoupment or repayment. We have -- we have a slide on it. I could show the Court if you would like. There's --

THE COURT: You can move forward to that slide.

MR. MARGOLIS: Sure. There's authority under the

Texas code in terms of how the state can get money back if there's been an overpayment. So it says, first of all, the OIG may recoup an overpayment. The inspector general did not. It's important because that's an administrative remedy, Judge, that actually provides the affiliates in this instance with significant due process protections.

Mr. Bowen, the inspector general at the time who issued the termination notices, admitted at deposition that these are important due process protections to the providers, only some of which are actually mentioned here, to ensure that the provider knows that it has an obligation, has an opportunity to pay the money back, that it actually even has the ability to ask for an informal adjudication by statute.

These are mandatory terms. Texas didn't do any of that here.

And this last provision of the Texas Administrative Code, it says what? "If after the effective date of the termination, a person submits "claims for services," so this is under the relators and the state's theory, Your Honor. We're not conceding this question about whether we were terminated on the date of the notice. We obviously dispute that vigorously.

THE COURT: Assuming arguendo, yes.

MR. MARGOLIS: And it goes on to say the person may be liable to repay. That's discretion. That's Simonow, Your Honor. That's the Simonow case. It depends on a subsequent

event. It depends in some form or fashion of the state taking some type of action in this circumstance, in the circumstance of a termination. Some subsequent action that triggers an obligation to repay. And that's why it's so different, Your Honor, from the -- and we're going to talk a little bit again, Your Honor, and I don't mean to jump around but I want to be responsive to your immediate questions. It's so different from the Affordable Care Act 60-day rule.

In that instance, you're talking about when a provider -- I'm going to give a, you know, sort of a run-of-the-mill factual circumstance, a provider realizes that either intentionally or by error they build, let's say, for patients they've never seen. There's no entitlement there. There's not -- we're not talking about an injunction that's then later lifted and whether or not there's a termination where the state may or may not seek recoupment or restitution or -- we're talking about they've received money that they were never entitled to.

And if they identify that, they have 60 days to pay it back. That's what the ACA stands for. And after they identify it, if they don't pay it back within 60 days, it becomes an obligation for purposes of the Reverse False Claims Act, the federal Reverse False Claims Act. That's all the ACA does. That's all the weight it provides to this case. So if I could get back for a moment, Judge -- so Arkadelphia does not

stand for the proposition that when an injunction is later lifted there's an automatic obligation to repay. Frankly, I'm not sure why there'd be a need for the federal rule of procedure that provides for injunction bonds if there's an automatic requirement to repay. There needs to be an action to recover and then there needs to be a judicial -- a judicial decision, an exercise of judgment in some way or another.

A case for which they -- on which they rely, National Kidney Patients vs. Sullivan, 958 F.2d 1127, it only speaks to the DC circuit, Your Honor. It only speaks to the presumptive recovery on an injunction bond, a presumption of recovery. And this is where there's an injunction bond, not like this case where there is none. And it goes on to talk a little bit about restitution and it talks about the possibility of seeking restitution or recoupment based on an injunction that was later lifted. It certainly never speaks in terms of absolutes, that there's a requirement to disgorge monies that you obtained during the pendency of on injunction.

Your Honor, there's a case -- another case in which they rely. They didn't -- I believe mentioned in argument but we sure would like to because we think, frankly, it's more to our benefit than the government's. I say the government's, Your Honor, I should be more precise, the relator and the state.

I am also, Your Honor, in times a criminal defense

lawyer so if I -- if I devolve to government --

THE COURT: On most days, I'm looking at an AUSA and an AFPD on opposing sides so I slip into the same.

MR. MARGOLIS: Not the FPD, Your Honor, but I once had the role of being a criminal assistant, so --

THE COURT: I made the mistake too.

MR. MARGOLIS: -- if I -- if I devolve into saying government, of course, the U.S. has not intervened here so what I'm meaning to say is Texas and the relators.

THE COURT: Understood.

MR. MARGOLIS: Thank you.

So if we could talk for a moment about Bayou Shores, that's slide 14. So, Judge, the language of this case is interesting and important. It's from the Eleventh Circuit from 2016. And in this cases it's not a False Claims Act case but it's similar factual circumstances in the sense that there was a termination. There was a termination from Medicare and Medicaid of a provider. That provider then went to bankruptcy court. And the question arose and I believe the bankruptcy court at least stayed or even vacated the terminations.

And so there was a question about whether or not there was jurisdiction in the bankruptcy court to do that. And the Eleventh Circuit ultimately concluded there was no jurisdiction. It's really the Kauffman circumstance, Your Honor, right? The injunctions are vacated because there's --

not because of the merits but because en banc no private right of action under Section 1983.

But what does the court say? Does the court actually hold that there's an affirmative obligation to then pay all that money back? Absolutely not. What it actually says is a holding that there was no subject matter jurisdiction would allow the government to go forward with its efforts to terminate, allow the government to try and recover payments, nothing automatic about it by virtue of the vacatur of the injunction.

And these facts, Your Honor, if I might I'd like to point the Court to the language of the injunctions themselves that were issued by Judge Sparks in Texas and Judge deGravelles -- I checked with a colleague of mine in Louisiana to make sure I would pronounce the judge's name properly. Judge deGravelles in the Middle District of Louisiana. The relators characterized in the injunction as if it was an injunction to prevent -- I'm trying to put exactly how they put it, enforcing the terminations or taking acts to enforce the terminations, as if the terminations exist somewhere out there in the ether and the only thing that was enjoined is whether or not the -- whether or not state officials could take action to enforce them.

That is not what the injunctions say. The injunction language is very clear. The injunction is to prevent the

actual termination of the Medicaid provider agreements with Judge Sparks on top. On the bottom, enjoin from terminating any of the provider agreements. And, Your Honor, at this point in time, there is the 30-day clocks or whatever you actually time limit -- well, I believe it's 30 days in both states. They have not run; it's undisputed.

This is not an Azar circumstance, Judge. This is a circumstance where it's an agency action that has been stopped by an injunction. But counsel -- and with respect, I -- counsel for the relators had said there was an injunction in Azar. We checked. There was no injunction in Azar. No injunction was ever issued in Azar.

Judge Sullivan, Emmet Sullivan in the district of DC was faced with the question of Harper retroactivity and how to apply it. Harper judicial retroactivity. Not with respect to an agency action, Your Honor. But with respect to a rule that he had held was vacated under the Administrative Procedures Act and the DC circuit disagreed with him. And so then the question was what's the effective date of that regulation?

Azar doesn't touch on an injunction whatsoever. Neither does Harper. We've looked very closely too, Your Honor, and we have not found a single circumstance when judicial retroactivity as announced in Harper has ever been applied in this way. And certainly a federal False Claims Act case -- well, and also a state False Claims Act case, we would

submit respectfully, is not the place to do it to apply Harper judicial retroactivity to treat an injunction that existed as a matter of fact as if it never existed.

THE COURT: So let's turn -- I know that we have multiple courts involved in your two timelines, Texas and Louisiana, but let's jump forward to the one relevant to Texas and then --

MR. MARGOLIS: Sure.

THE COURT: -- Judge Livingston in Travis County District Court. So there Judge Livingston found no authority holding that a federal injunction stayed administrative deadlines that apply and the remedies that the client has to pursue. Do you continue to argue that the federal injunction's in place? So here there's one from the Western District of Texas and then one from the Middle District of Louisiana. The Court finds that your chronologies and your PowerPoint have accurately depicted those relevant timelines.

Is it still your argument, even though it didn't sway Travis County District Court, that the effect of those injunctions -- I'm assuming you've given me your best argument and your best case for the argument that those injunctions do have preclusive effect.

MR. MARGOLIS: Well, Your Honor, I think that -- I wanted to make sure we're clear as to what the decision in Travis County actually stood for by Judge Livingston. It's

not -- the issue before the court there was whether or not the Texas affiliates were entitled to a further state remedy, right. In other words, whether or not there was --

THE COURT: I think the court there is also looking for maybe the unicorn in this case, like which case can we cite on the plaintiffs' side, defendants' side or the court's side that involves this exact chronology of injunctions and court interventions in an FCA case. So we're all strained to find the case. And Judge Livingston found at least at the tail end of this chronology that there was no authority for the idea that a TRO or a PI in place by a United States District Court tolled or delayed the administrative deadlines that apply under the FCA. She couldn't find authority for that.

I don't think I have found it in the briefs but I think I've heard it today, your argument. Is it the Simonow case you think is your best case for that concept, that -- at least in this concept -- context of a FCA case and specifically a reverse false claim case, your best case is Simonow, I believe it was?

MR. MARGOLIS: It's one of them, Your Honor, yes.

THE COURT: Okay. Give me your best cases for the concept, that for the intervening period in these dotted lines depicted on your demonstrative both for Texas and Louisiana, that those injunctions toll or delay or in any way have any sort of preclusive effect on the administrative remedies that

you're obligated to pursue to keep your claim alive under the FCA.

MR. MARGOLIS: Well, Your Honor, I just want to make sure that -- I'd like to try to disentangle two concepts.

THE COURT: Okay.

MR. MARGOLIS: If I might.

The TRO action didn't relate to whether there are administrative remedies under FCA that had to be exhausted one way or another. The TRO action was a pretty narrow question of Texas administrative law which was, could the affiliates continue to challenge their terminations administratively. And Judge Livingston said no. It had nothing to do with an obligation to repay or not repay monies that were obtained pursuant to the prior injunction. She just found as a matter of state law I can't find a reason to say -- even though she did say she was troubled by the facts in the underlying terminations.

And she did issue a TRO, Your Honor, so again we take issue with the characterization that this is a meritless or frivolous case that was filed. But what she did find ultimately in dissolving the TRO is I don't find that the state clock was suspended for purposes of obtaining administrative review.

It really said nothing about the False Claims Act and an obligation to repay. For an obligation to repay, it's

Simonow and the many cases -- other cases, you know, very good case that has a long exegesis, Your Honor, on Reverse False Claims Act precedent is the Tailwind case; it's actually the Lance Armstrong case is sometimes the way people refer to it as a fairly scholarly dissertation on how Reverse False Claims Act liability works, and I would recommend that to the Court.

But it's the -- that obligation under the Reverse False Claims Act can't be contingent. It can't depend on some further action by some other body. So even -- you know, I believe going back to the motion to dismiss point, Your Honor, if we even have a slide on Simonow, if I could please have it.

You know, we cited it at the motion to dismiss, and of course, we're not here to reargue motion to dismiss, Judge. But Your Honor had pointed out that there was one part of the opinion that I wanted to make sure we just fully cite here, right?

The holding is contingent, penalties are not obligations under the FCA. We say it's no different from contingent debts, which is what this would be and that's what the Lance Armstrong case is about. And what it goes on to say is to be clear, the fact that further governmental action is required to collect a fine or penalty does not, standing alone, mean that a duty is not established. I believe we cited that sentence. But then it goes on to talk about the circumstance, customs duties. There's no government action required to

collect customs duties. You affirmatively owe them. That's the example the court uses, right?

So if there's some -- and then it goes on to say, "The distinction as a customs laws imposed a duty to pay." And we've quoted it here. It says, "The duty to pay" -- here, they're talking about penalties -- "is not established until the penalties were assessed." That goes back to the point, Your Honor, until there's a restitution action, there's an injunction bond where there's been an action for damages, there is no affirmative obligation to pay back monies that have been obtained through an injunction that's later vacated - --

THE COURT: Okay. So I have your argument on that.

Let's maybe begin at the beginning and now I'm apologizing to counsel for jumping around.

MR. MARGOLIS: -- no.

THE COURT: What is the effective date of termination? So here the Court reviewed attachments to both sets of briefs filed. There's an e-mail from January 4, 2021. It's from affiliate's counsel to HHSC. It's a colloquy about effective dates of termination. I believe this may be found at ECF Number 482-1 at 3. And the question is posed to Texas HHSC for the record, what is the effective date of termination? So I believe that's at page 3.

MR. MARGOLIS: Your Honor, I think that's an e-mail that was referred to by opposing counsel, I believe. Can we

please have the slide on that? I want to make sure we're talking about the same exhibit.

THE COURT: Yeah. So here, I have it, and this is why I instructed counsel to coordinate with the law clerks to make sure we were using the same ECF watermark here, I have it as 482-1 at 3.

MR. MARGOLIS: We've got it, Your Honor, although, I apologize, we have it 482-1 and we have it at pages 14 through 17.

THE COURT: Oh, you are correct. You are correct.

MR. MARGOLIS: But I'm almost sure it's the same e-mail, Your Honor.

THE COURT: Yeah, I know. That's right.

MR. MARGOLIS: Okay.

THE COURT: So I have it as ECF Document 482-1, but maybe page 3. Page 14 of 553.

MR. MARGOLIS: Sure. So a couple of points to raise here on this e-mail, Your Honor. First of all, it's Louisiana, it's not Texas. I just want to make sure it's clear on that. This is Carrie Flaxman who's representing the Gulf Coast affiliate.

THE COURT: And so she's corresponding here with LA.gov officials.

MR. MARGOLIS: Right.

THE COURT: Okay.

MR. MARGOLIS: That's Louisiana.

THE COURT: Okay.

MR. MARGOLIS: And the question that she's asking -- and this is an e-mail between lawyers -- and this is going to be important, Your Honor. I think, again, what they're using it for wasn't to try to establish the effective -- the termination date. And I'll just tell you just to jump ahead, there was no termination of Louisiana. So -- and we'll get to that.

But the question isn't the effective date or termination, whether there was a termination in Louisiana. It's a exchange between lawyer to lawyer and it's asking for the state's position, right.

So, what do we have is the question. The question, I believe, that's being responded to in Question 2, Secretary Kliebert's letter to Ms. Linton -- Ms. Linton is the CEO of PPGC -- states "The termination action will take effect after the termination of all administrative and/or legal proceedings? Does this state if PPGC elects to continue in federal court?"

So it's the question as a matter of Louisiana administrative law, will we -- because there was still time left on their administrative appeal clock. So as lawyers do, asking the lawyer for the state, what's the state's view if we go the federal court route, does that mean that we get to have additional time on our clock? What's your view on that as a

matter of administrative appeal?

And what's the state's answer? It's -- first of all, fairly equivocal, Your Honor -- it's my understanding, and I will double-check with clients, is that the suspension nature only applies if you receive through administrative process. If your client forgoes that clear avenue affording your client clear full due process, I don't believe my client can make the commitment.

The question -- I don't think -- I can't tell you that Louisiana's going to allow you to have extra time if you go the federal injunction route. But what -- this is a sentence that again, with respect to my colleague, she skipped over when she showed you this. It was on her slide, she didn't even read it, the red line underlined part. The client would, of course, follow any court orders. And this is before the injunction was entered by Judge deGravelles.

So what is counsel for the state saying? As a matter of administrative law, I don't know that my client's going to give you more time. But if you get an injunction, of course we're going to follow it.

As a matter of scienter, Your Honor, which is again how the relator used it as, it's pretty powerful. It's not the state saying, Oh, you will be terminated. And, you know, an injunction -- I mean, you know, Your Honor, I use this term because Judge Smith used it in Simonow, with apologies to the

Court. This is not Schrodinger's injunction. Judge Smith used Schroedinger's penalties in Simonow. It's not an injunction that exists and then doesn't exist and then exists, it's not Schroedinger's terminations that exist and then don't exist and then they exist. These either happen as matters of fact or they don't. They're not legal constructs.

So here, the state's lawyer is saying -- I mean, almost what better evidence would there be if scienter in our favor or lack of scienter -- the state is saying, Well, we don't know we'll give you more time, but we'll follow court orders, meaning, not going to be terminated. And the proof is in the pudding, Your Honor. Louisiana didn't terminate. Judge Rabble -- Judge Rabble, I'm sorry. Judge Grav --

THE COURT: DeGravelles.

MR. MARGOLIS: DeGravelles. Thank you. I sometimes trip over the Cajun names.

THE COURT: I can't imagine what people have done with my last name, so I'm --

MR. MARGOLIS: Judge deGravelles.

THE COURT: -- very, very lenient on mispronunciations.

MR. MARGOLIS: I appreciate that, Judge. And I tried so hard to get it right as I told you.

So Judge deGravelles had an injunction in effect all the way through -- going to use my Louisiana timeline, Your

Honor, to make sure we're on the same page -- all the way through November 10 of 2022 is when it was dissolved on joint motion, basically, by the state of Louisiana and PPGC pursuant to a settlement agreement.

And the -- with -- sorry. The termination notice was withdrawn. The settlement agreement says "prospectively withdrawn." We can accept that language, Judge, even though if I'm not entirely sure what it means. The reason that we can accept that language is because the injunction was in place. The injunction remained in place until the dismissal pursuant to the settlement, and then the termination notice was withdrawn. Today PPGC is a provider in good standing in Louisiana Medicaid.

The only way that the plaintiffs can proceed with this Louisiana Reverse False Claims Act claim is that if you treat that injunction as if it was a total fiction. Now let me ask -- let me address an issue because I think a question was raised again about whether or not this issue of continuing the injunction after Kauffman was frivolous in some form or fashion or -- it was not. The reason it was not is because Louisiana before Kauffman came out en banc, filed for a stay based on two issues. One was whether Kauffman will -- let's wait and see what the Fifth Circuit's going to do en banc with respect to private right of action.

The other issue had to do with sovereign immunity.

The state asked for two issues. So they came back to Judge deGravelles, and they said, well, Kauffman's out. Judge deGravelles reminded the state, Well, hold on a second. You said there were two issues and the sovereign immunity issue hasn't been resolved yet.

So that injunction continued pursuant to Louisiana's request. The stay of the case -- the injunction continued to an effect until the parties mutually agreed to lift it. And the notice of termination was withdrawn.

There's another provision in the settlement agreement in case it comes up, Your Honor, and I -- it appears to have to have been drafted in some way with respect to concerted action between the -- either the state or the relators and the state of Louisiana, which is obviously not here. They didn't intervene. It says the injunction -- the settlement agreement will have no effect in this case or words to that effect. Even if you were to treat the settlement agreement as if it never happened, which seems to be why the language was included, you're still left with facts. A fact: The termination continued until it was lifted by Judge deGravelles. Fact: The notices of terminations were withdrawn.

So there was no termination in Louisiana, full stop. Now if I could address Texas, Your Honor, because I think, you know, we started down this road when was -- when were the affiliates --

THE COURT: That's right, and so --

MR. MARGOLIS: -- terminated from Texas?

THE COURT: I know I will hear from the federation for a different attorney but here, as counsel for the affiliates, I want to make sure I understand the import of the e-mails that were attached, and I'll run through those and I'll identify them by ECF and let me know how the Court should read that evidence at this stage of summary judgment as it relates to scienter and the reverse false claims.

So there is an e-mail dated December 2nd, 2015. I believe this is at ECF Document 475-13. And this is from an employee that states that she was, quote, "Not comfortable assuming we will get paid for any claims that happened after termination." There's a letter attached as ECF Number 475-13. There, it's a letter dated December 15, 2020. It's from affiliate counsel, I believe, to Texas HHSC, stating that a formal appeal of the 2016 termination was done, quote, "In an excess of caution."

There's also attached to the plaintiffs' kit of evidence an e-mail from November 25th, 2020. This is from a Planned Parenthood employee. I believe this is the PPST affiliate. They were awaiting Fifth Circuit ruling. I believe this document is at ECF Number 475-13, quote, "As we feared, it is an unfavorable ruling." That affiliate feared that the unfavorable ruling may affect the payments that were at issue.

There's another e-mail chain at ECF Number 482-1, and the colloquy there starts in a question/answer format, and, you know, consistent with the Court's orders on redaction, I'm not referencing any staff by name. But here it is based on my read of the e-mail, a PPFA senior staff attorney:

"Question: Does this stay apply if PPGC elects to continue in federal court?

"Answer: My understanding -- and I'll double-check with the clients -- is that the suspensive nature only applies if you proceed through administrative process."

And then at the bottom, "You are correct if Planned Parenthood does not exercise the right to an informal hearing or an administrative appeal that the termination is effective as of October 17, for the other providers October 18."

So all of these e-mails reflect an ongoing dialogue about the effect of administrative remedies and whether that triggers an FCA obligation to repay. Is plaintiffs' reading of these e-mails and the way that this has been briefed to this Court incorrect, and if so how?

MR. MARGOLIS: Yes, Your Honor. And I will admit up front, I don't have each of the e-mails in front of me, so if I misspeak --

THE COURT: I believe I only cited from e-mails attached to the plaintiffs' briefing. But if there's a particular one I can repeat a citation.

MR. MARGOLIS: Well, yes, Your Honor, I'm not asking you to do so. I was just only apologizing in advance if I --

THE COURT: So there intends to be -- there appears to be this internal dialogue among counsel and affiliates and legal officers. And everybody seems to agree that they need to pursue administrative remedies and that the stays don't have the sort of effect depicted in your chronology here or in your briefs. I'll allow you to argue against that construction of this series of evidence.

MR. MARGOLIS: All right. Well, Your Honor, I mean I appreciate it. I believe the answer for each of those is similar to answers I've previously given with respect to the e-mail we've already looked at with Louisiana. Each of those e-mails have to do with administrative remedies and whether or not there's a suspension as a matter of administrative law for their right to continue with appeals, right. I don't believe any of them speak to whether the injunctions, they didn't consider themselves to be subject to injunctions or not subject to injunctions that allow them to remain in the program, much less do they speak to any obligation to repay monies that have already been paid out during the pendency of a court order.

Because that's the intent that's required here, right. The intent that's required here -- even if, let's assume, hypothetically, which we don't believe there is, that there was ever a question about, you know, what would happen

later if a Court were to disagree that we can remain in the program, which I don't believe those e-mails stand for, but let's for sake of hypothesis say that they do.

None of them speak with the intent that's required under the Reverse False Claims Act, which is, Did we think we would have to pay money back that we obtained during the pendency of those injunctions much less the grace period, which we haven't talked about, Your Honor, but it's critically important that we do.

So it's not the scienter that matters for purposes of the False Claims Act. The scienter that matters for purposes of the False Claims Act is whether or not people at the affiliates believed -- either actually believe -- we actually have a Schutte slide. Can I have the Schutte slide, please, Your Honor.

Oh, I'm asking you. I'm sorry. I'm asking -- what I meant to do is ask my colleagues. I'm going to show you the Schutte slide, Your Honor.

THE COURT: Oh, yeah. I'm sorry. I sometimes call this SuperValu and sometimes Schutte. What is the convention now?

MR. MARGOLIS: I think it's Schutte because I was at argument, Your Honor, but you know what, you can always call it SuperValu if it's easier. That one we know we're pronouncing properly.

THE COURT: Okay. For record purposes, let's just all refer to Schutte, which is S-C-H-U-T-T-E, the case recently decided by the Supreme Court. You may proceed.

MR. MARGOLIS: Okay. And actually, it's not this -- I mean, well, let's go back because there is a temporal aspect that's important. I mean, obviously, we're talking about here the Reverse False Claims Act but we think it's the same principle that would apply, right? You don't measure intent after the fact. You measure intent at the time the claims were submitted. So, you know, again the question would be, Is there any evidence at the time these claims are actually being submitted pursuant to injunction? That people thought they would have to pay the money back.

But if we could look at now what the Supreme Court actually said about intent, you know the three flavors of intent under the federal False Claims Act, Your Honor, but again we're not talking about materiality here which I understand there's a distinction under Texas law. I think Your Honor already correctly identified and both Louisiana and Texas interpret their False Claims Act consonantly with the federal False Claims Act. Actual knowledge. Did any of our folks actually believe they had to pay money back? Not a scintilla of evidence of that, Your Honor. Not a scintilla.

Deliberate ignorance or reckless disregard. Did anybody intentionally avoid taking steps -- well, actually,

before we even get that, is there any evidence that anybody was aware of a substantial risk that they had to pay that money back. Not a scintilla of evidence of that either, Your Honor. These e-mails as we've already talked about relate to questions about the suspensive effect or not in terms of administrative remedies, not -- with respect to termination, not whether or not monies have to be paid back.

Reckless disregard is similar. Folks who are conscious of a substantial and unjustifiable risk they're going to have to pay it back. Conscious of it. There's -- I submit, Your Honor, no testimony in this case whatsoever. In fact, there's the opposite, including declarations from the CEOs of each of the three affiliates, that anybody even conceived of the possibility that they would have to pay the money back when they remained in the program pursuant to court order and the grace period, Your Honor, when we're talking about Texas.

Let me just briefly touch on "improperly." Judge, you know, we -- and we can understand the briefing was voluminous, so in case the Court missed it, we did actually brief, though briefly, what improperly means for purposes of the --

THE COURT: You briefly briefed?

MR. MARGOLIS: Briefly briefed, Your Honor.

THE COURT: You briefly briefed, okay.

MR. MARGOLIS: It's page 50 of ECF 468, but just

again to invoke Justice Scalia in textualism, and could I have -- so let's start with the dictionary definition because the statute doesn't otherwise define improperly. Here's what Black's Law Dictionary has to say about fraudulent or otherwise wrongful. Now, let me have the text, please, of the federal Reverse False Claims Act.

So we have the word "knowingly" three times and it also appears in the affirmative False Claims Act, Your Honor. So submitting claims. It's statutorily defined knowingly separately. Knowingly makes uses or causes to be made or used. So that's affirmative act of some kind, right? Knowingly conceals an affirmative act of some kind. Knowingly and improperly avoids or decreases. We don't think there's anybody who's alleging here that we decreased an obligation to pay. That would be as if we thought we had to pay X and we actually paid X minus Y.

So what we're left with is knowingly and properly avoids. Now, Your Honor, I'll submit avoids is an action verb in some form or fashion so mere retention is not enough. But let's put that aside for a second. Canons of statutory construction compel this Court to not read improperly as if it's not in the statute. You're supposed to avoid surplusage.

THE COURT: I knew that was coming.

MR. MARGOLIS: Especially when Congress uses the word over and over again. It's not like Senator Grassley missed

knowingly; he wrote the False Claims Act in 1986, the amendments. This comes in 2009. It's actually an amendment; I think that's sponsored by Senator Kyle then of Texas. And uses the word -- and let's avoid the legislative history, Your Honor, because I know that it can be suspect. I'm trying to follow Justice Scalia's rules. He does make a floor statement about it, however, but I'm not even going to get into it.

The word has to do some work. So it's not just enough that you know that you're holding on to money. It has to be that it was improper for you to do it. Some type of fraudulent or wrongful intent associated with that. That is utterly lacking in this case. About paying the money back.

THE COURT: Okay. So let me go -- and this -- this -- and I thank you for highlighting the prior question about the construction this Court should give to the qualifier improperly. So in looking through the evidence submitted by counsel, there are a series of e-mails again that just repeat that there is an assumption that -- I think this is an e-mail from December 2nd, 2015, ECF 475-13, "not comfortable assuming we will get paid for any claims that happen after termination." There seems to be an -- a discomfort or a disquiet with whether these claims will be valid moving forward.

Is that explained by the chronology that you've set out in these demonstratives that we're simply talking about lawyers talking with their clients about which administrative

remedies trigger which obligations, or is this the sort of scienter evidence that the plaintiffs represent and if we are to give a -- you know, if we're to make new law in construing the term improperly, does this not reflect some improper motives during some of the periods at issue whether injunctions are at place or otherwise. Like is this not the type of evidence this Court should look to in deciding if any of this was improper?

MR. MARGOLIS: We respectfully submit no. You're probably not surprised by my answer, Your Honor. I mean, the reason is that it's not whether there's a question out there in the ether about whether it's improper. The Supreme Court has cautioned as recently as Escobar and maybe even as recently as Schutte, Justice Thomas wrote both. It's not a general anti-wrongdoing, anti-fraud statute. Improper is relating to avoiding an obligation to pay or transmit money or property to the government.

So what is it modifying? Did Planned Parenthood improperly -- the affiliates here improperly avoid an obligation to pay money. All of those e-mails, again as we've submitted to you, relate to suspensive effect as a matter of administrative law as to the terminations and not one -- I think there's at least the one that raises the question about, Are we going to continue to get paid. Not one relates to, Do we have to pay any money back. It's not even a suggestion.

And I would submit that if the plaintiffs had any evidence of anything close to that they would use it.

They deposed a large number of people. If they had a single deposition, a single snippet of evidence that they could point to that said Ah-ha, so and so knows or suspected they would have to pay money back if the injunctions, you know, were later lifted, you'd see it. We wouldn't be left to guess. Again it's a fraud case.

THE COURT: So I have your argument on that. And that's most pertinent to the reverse false claims but before turning to implied false certification and your arguments there, one of this government knowledge defense -- the principle that the government's knowledge of the falsity of the claim can defeat FCA liability? It's almost like a ratification defense.

MR. MARGOLIS: Yeah. And to be -- Your Honor, I want to make sure that we -- I'm going to refer at least to Colquitt and from the Fifth Circuit from 2017. It's not properly understood. It's not a --

THE COURT: That's exactly the case I'm referring to.

MR. MARGOLIS: Okay, perfect.

THE COURT: How did we have both knowledge and acquiescence or explain to me how Colquitt can apply here --

MR. MARGOLIS: Sure.

THE COURT: -- and what acquiescence you discern in

the actions of Texas in this case, not Louisiana but Texas.

MR. MARGOLIS: Sure. And I'll do that, Your Honor.

And I just -- make sure I'm stating it accurately legally. It's really because it helps to show the defendant reasonably believed that in this instance it would be they didn't have to pay any money back, right? So it's the fact that if the government knew about it and they didn't do anything about it, it's reasonable for the defendants to believe they didn't have to do anything about it. I believe that's -- I just want to make sure I'm being clear in terms of how we would rely on Colquitt, right?

It's the grace period, Your Honor. And let's please talk about the grace period. It's critically important. Let's start -- I mean I -- Your Honor, we have a slide. I don't know if it's worth showing you. We -- from the briefs, we gave you numerous instances both in the Texas code and in cases where the word "grace period" is used. And when the word grace period is used, it is used to essentially delay something. It's like the difference between -- let's take it in the insurance context. You stop paying insurance premiums and you have a grace period of X period of time before your insurance coverage lapses. That's what a grace period is.

It's basically saying after a certain event, we're going to continue to provide you, in my instant study used, insurance benefits. There's no dispute the grace period was

entirely voluntary by the state of Texas. And, Your Honor, it proves that Planned Parenthood was not terminated in Texas before the grace period. If it was, Texas had no authority for the grace period under -- as a matter of statute.

Let's start with our request for the grace period, please, and I'm going to ask my friends here to bring up the letters. Can I have a time check while they do that? I want to make sure. I don't -- that's where I worry.

THE COURT: You have 33 minutes remaining.

MR. MARGOLIS: All right. Thank you, Your Honor. I appreciate that.

There's been characterizations in terms of what Planned Parenthood actually asked for the affiliates as part of the grace period. I want to make sure it's absolutely clear from the exhibit itself, and the reference, Your Honor, is here on the slide. It's ECF 467 at 390 to 397. So what's the request? A six-month grace period to allow our patients to take care of urgent health needs during this crisis stage of the pandemic. That's critical. It's cast by my friends on plaintiffs' side as if it's just a transition, it's just a transition. That's not what they requested. We requested can we continue to see Medicaid patients for six months.

Earlier they had asked can we remain in Medicaid. Critically important from a scienter perspective, Judge. I think there's a brief from our friends who characterize it as a

get back into Medicaid. That is not what the request says. So I would ask the Court to look at the exhibit.

It says remain in Medicaid. If you're not going to let us remain on Medicaid, six-month grace period, take care of urgent health needs and to allow us to help our patients attempt to find new providers. I think our letter doesn't even mention the word transition. Here's the response from Texas: Your alternative request for a grace period will be granted in part. What's the restriction? Don't take any new Medicaid patients. There will be a 30-day grace period from the date of the letter to ensure the current clients receiving services at your clinics can be transitioned to new providers.

It doesn't even say you must transition them. The idea of the grace period is, We're not going to leave these patients high and dry through what's essentially a sudden termination.

So we receive the grace period from HHSC. There's no legal authority under the Texas code to give us a grace period if we've already been terminated. Zero. And if I could have the code provisions, please.

Mr. Bowen admitted as much, the former inspector general. So a couple of examples here on this slide, Your Honor. Texas administrative code, a person's enrollment agreement is nullified on the effective date of the termination. If our provider agreement was nullified before

the grace period, we can't have a grace period.

Once a person's enrollment agreement is terminated, no services furnished are reimbursed by Medicaid during the period of termination or cancellation. Well, we were providing services and we were being paid for them.

The critical, Your Honor, here's the notice of termination, the final notice upon which plaintiffs so heavily rely. We will be required to reenroll if you wish to participate as a Medicaid provider. Your Honor, there's no reenrollment here. There is no evidence, not a scintilla that the affiliates ever sought reenrollment. Why would the affiliates -- and there's a whole process for reenrollment by statute. There was no reenrollment here.

And, of course, we know that Texas, the state itself, has said they're not even seeking any civil penalties or recovery for services delivered during the grace period. There's more evidence, Your Honor, what did the state of Texas itself during a 30(b)(6) admit at deposition, which is a binding admission for purposes of this case? They said it both in -- on behalf of the state and on behalf of HHSC. This is ECF 467 at 251 through 52 and 256.

"Question: The Texas affiliates were enrolled in Texas Medicare" -- should be Medicaid, Your Honor, but -- "Medicare during the grace period, correct?

"Answer: That's correct."

That alone means we weren't terminated, Judge. That alone means we weren't terminated.

"HHSC understood that if a grace period was granted, the Texas affiliates would continue to see Medicaid patients, right, during the grace period?

"During the grace period, is that correct?

"That's correct."

Goes on to say, "Would you allow a provider to remain enrolled even if it was going to provide services in a legal manner?

"No. I believe HHSC would not allow a provider to remain enrolled if they were not going to deliver those services in a legal, ethical, safe manner.

"Didn't do that with respect to the grace period?

"We were trying to ensure a continuity of care for Planned Parenthood clients."

There's your government knowledge defense among other things, Your Honor. As a matter of state law, before we even get into scienter, why would the affiliates remotely think that they had been terminated before the grace period when they get the grace period? Not in evidence. I mean, again this is not Schrodinger's termination. It doesn't exist and then disappear and then come back. It's not alive and dead at the same time.

So absent any reenrollment, absent any meeting of any of the requirements, the state said, Stay in the program 30

more days, see patients. And this issue about supposedly we didn't transition patients even if that remotely matters, Your Honor, we did. And there's evidence. There's testimony from I believe one of the CEOs that they handed out cards to patients who came in saying, you know, you're going to need a new provider. There was one witness for PPGT, Mr. Lambrecht -- probably shouldn't have said his name in open court. The CEO of PPGT, who testified that he couldn't remember. He knew there were efforts to transition but he just couldn't remember as he sat there that day what they were.

Trans -- even again just to chase this theory for one more second, Judge, that the relators put up about transitioning, there's no objective measure of transitioning. So they may subjectively believe we didn't do enough to transition but there's no evidence that there was no effort to transition. And for what it's worth, Judge, there's no such thing as a CPT code for transitioning. You don't bill Medicaid to transition. There's no evidence that the affiliates billed for transitioning.

We billed for the health care services that we provided to needy Texans during that 30-day period. And then after that 30-day period or perhaps just before the expiration Your Honor, I want to make sure I don't misspeak on the chronology, went and sought the -- the action in state court, so I got a TRO, that TRO was lifted.

And this idea that there's evidence that we were trying to stay in Medicaid, yes, of course, the affiliates were trying to stay in Medicaid. We dispute the idea it's because we were trying to line our pockets. The evidence collectively shows for the grace period that the affiliates billed less than $100,000 altogether.

But even if -- I mean, so we would say, of course, and as witnesses testified it was because we wanted to continue to serve needy Texans. There's even evidence that one of the affiliates continued to serve needy Texans without billing for it. That's not consistent with lining pockets. But, Your Honor, just for a moment, let's assume -- let's hypothesize this is a for-profit corporation. Certainly here, that's not even an improper motive. It's not true in this case but attempting to increase your revenues is not improper.

So I think, Your Honor, we've hopefully disabused this sort of lying about the grace period and shown you what the actual import of the grace period is. It proves there's no termination.

Another key piece of evidence, Your Honor, what to do with the managed care organizations and how they acted. Very quick, managed care organizations, over 90 percent under Medicaid. These beneficiaries are members of the MCOs, and so I won't -- I won't take time arguing it but I wanted to make sure we at least preserve it. There's a whole separate issue,

of course, about given the way that MCOs work, which we briefed, whether there really can be any false claims here because the MCOs aren't paid for the state based on services; they're paid on the state based on capitation and per patient.

But here's what I want to focus about -- focus on. Okay. So let's take this slide down. The slide that I want on to get to is to show the instructions that the state actually issued to the MCOs about when to stop payment. Right, the MCOs work for the state. So the MCOs will take their instructions from the state as to when to stop billing. Texas notified the MCOs on March 19th of '21 were terminated effective March 11th.

So that shows not only government knowledge and again it's important for scienter purposes, but that shows where Texas believed the actual terminations took place. Not the legal fiction that's being advanced before Your Honor but as a matter of fact, is when they told the MCOs to stop paying. Also important, what did the state represent to the Fifth Circuit? This is pending on bank. It's the first bullet, Your Honor. They use future sense. They were attempting to lift the injunction pending on bank review. And they argued there is no justification for continuing to what, prevent the state from terminating.

Again, it's not Schrodinger's termination, Judge. Here they've told the Fifth Circuit stay these injunctions that are preventing us from actually terminating these affiliates.

Okay. So, Judge, that's the evidence that shows you as a matter of fact in Texas the terminations didn't actually happen until March of 2021, more specifically March 10th of 2021. And what happens then. The affiliates stop billing Medicaid. There's no evidence of a single bill being submitted after the deadline. Not one. Evidence again not of improper purpose but of actually following the law. They stopped billing when they were told to stop billing.

THE COURT: Okay. So let's turn to implied false certification theories at issue in the case. So here if you turn to the Kauffman opinion from the Fifth Circuit and specifically Judge Elrod's concurring opinion, there's -- I note that there's no evidence of deceptive editing or that the video is unreliable as a basis -- as a bases for termination.

Did I miss anything in the briefing or the evidence that would -- that would draw that conclusion into question? And I wouldn't entice disagreement with a Fifth Circuit judge, but is there anything that I'm missing in the evidence or in the argument before the Court that would suggest that this was not a basis for termination, that there was some deceptive editing or anything that would affect the weight both Texas and Louisiana give to the videos at issue?

MR. MARGOLIS: So let's put aside whether the question of deceptive editing for a moment, Your Honor. To our mind, the issue is whether the videos were sufficient in order

to terminate. Which I think, frankly, is not for an implied false certification with respect to the court, it's not really the right question and I'll explain why in a moment.

But with ample respect to Judge Elrod and not meant as a criticism, it's a concurrence. It's not even joined by a majority of the en banc court. It's seven judges, I believe, and I believe Judge Dennis joined by another one of his colleagues would have gone the other way. And the majority opinion, the actual opinion of the court itself, says absolutely nothing about the merits of the underlying termination. And in fact even in Judge Elrod's concurrence, there it's couched in the context of administrative law. It's not independently whether or not for purposes of a fraud case this would render claims impliedly false. It's couched in terms of is -- was Texas' termination decision as a matter of administrative law arbitrary and capricious.

That's the only context in which it comes up.

THE COURT: So how is this Court supposed to determine what you characterize as objective falsity? So I take it that your view is the Court -- this Court should lean on CMS' view of your qualification as a provider. I also have plaintiffs' arguments. So if this Court is tasked with ascertaining objective falsity, how exactly should the Court weigh that in the context of implied false certification theory and whether representations to Texas and Louisiana were

material? Should I lean on CMS? Should I lean on what the court said about your qualifications in Kauffman. What would -- what would defendants have this Court do in trying to ascertain the objective falsity of alleged misrepresentations or certifications made to the states Louisiana and Texas.

MR. MARGOLIS: And thank you for the question, Your Honor. Again we'll start with first principles right under -- well, it's actually not Escobar but other cases that have certainly held objective falsity requirements, including I believe the Fifth Circuit had referred to it -- I'll get it. Oh, well, I'll get it, Your Honor. Riley, I think, talks about it in the context of judgments about which reasonable minds may differ. We already know reasonable minds differ. You've got Judge Sparks who found not a scintilla of evidence to support the terminations. You have Judge deGravelles who used similar language with respect to calling -- well, we could put the quote up very quickly but calling it, you know, raising questions and concerns about the underlying -- whether or not -- sorry, the videos provided the evidence.

The apparent fragility -- this is the quote, I'm sorry, Your Honor. "The apparent fragility of the second termination letter stated reasons raise another specter for not one appears to be a supported factual allegations of the kind of fraud and ill practice with which the Louisiana False Claims Act is concerned." Judge Livingston, "Great cause by the

underlying facts." You have jurists who are disagreeing about whether or not these -- the video presented a basis for a termination substantively. So what is -- again if we're talking about an objective yardstick, there's some pretty compelling evidence here. There's no objective yardstick. But I'll go further, Judge. Both Mr. Bowen and Dr. Spears at depositions couldn't point to any specific underlying medical ethics.

THE COURT: And that was my next question, whether failure to disclose to the states Louisiana and Texas certain ethical shortcomings would be the sort of predicate for an implied false certification claim, and if ethics are not enough, what is enough?

MR. MARGOLIS: Okay. So couple of things there, Your Honor. Now, to be clear, first of all, we don't concede for a moment that there actually was any violation. In fact, Mr. Bowen, under questioning actually by me, admitted there was no evidence of any actual violation. And if I could have -- and I'm worried about my time, Your Honor, but if I may continue to --

THE COURT: You have 15 minutes remaining.

MR. MARGOLIS: All right. Thank you.

If I could have -- so let's see what Mr. Bowen had to say. He wrote the termination letter. You watched the videos, I believe he testified multiple times. So he was asked a

series of questions about whether there was an actual violation, an actual violation.

Name a single doctor who altered an abortion procedure to obtain fetal tissue? Can't do it. Single patient. Can't do it. Single date of service where it actually happened, can't do it. Nothing on the video where an abortion procedure is actually being performed, that's correct.

So I believe where he left it was a willingness to do these things, these alleged acts but not an actual violation. The False Claims Act requires an actual violation of some kind, an actual violation of an objective standard that renders a claim false.

Could I have the slide that shows Escobar, please? Because again we're talking about an implied false certification claim here, Your Honor, and there's been representations from my colleagues about these -- again, using the word "representation" twice; it's a little bit like briefly briefs.

Representations or arguments from my colleagues about the representations on the bills. Your Honor, they don't -- haven't given you a single bill to look at. We're at summary judgment.

Where is the bill that supposedly includes these representations on it? They represent to you that every time a provider bills they have certified that they're following the

entire universe of regulations. I would -- when we're -- in a world where we're concerned about overreach of the regulatory state if we're talking about the Medicare/Medicaid rules, I don't know that you could see me if I was going to print them out and put them out in front of me. And they just blithely assert when you bill you certify you've complied with everything without showing you a single representation that actually does that. Not one. Not even a bill. Not even in evidence. Not one.

So what did Escobar when Escobar recognized implied false certification theory, you know, Judge -- Justice Thomas -- excuse me -- was fairly specific about what it means and what it doesn't mean. Where a defendant makes representations in submitting a claim but admits violations of statutory regulatory contractual requirements, those admissions can be the basis for liability if they render the defendants' representations misleading with respect to what, the goods and services provided.

Your Honor, this is Medicaid. Abortion services aren't reimbursable. So here you're saying that without giving you a single bill, without showing you a single representation, they're saying that we made representations that are apparently false, not related to the services that actually were provided, so things like cervical cancer screenings as we've talked about, well health visits, et cetera. But services aren't even

covered by Medicaid. And they can't give you a single violation that actually happened. No evidence of one. Just concerns and willingness.

Again we're not here to debate whether or not that may or may not justify a termination. We've already shown you multiple jurists who raised questions about whether really it would justify a termination as a matter of law, and obviously you heard from the federal government that says we don't believe it would, but that's not what this is about. We're in a False Claims Act case, it's a fraud case. So principles of fair notice and to prevent us from being subjected to unfair liability, that's why the objective falsity requirement exists.

Now, Your Honor, I want to make sure because you raised Westinghouse as a materiality point but I -- I'm very familiar with the case so I wanted to make sure I at least address it because I don't think it's something we talked about before.

So Westinghouse, it's implied -- I'm sorry -- it's a fraudulent inducement case from the Fourth Circuit. First of all, there's no fraudulent inducement claim here at all, but be that as it may, it included in a definition of materiality. And with respect to the court and suggested at least in that case, maybe even if the agency did something that's completely contrary to the allegation in materiality, they might still be materiality.

That's pre-Escobar. The Fourth Circuit didn't have the benefit of Escobar. Justice Thomas -- and again this was because there were a lot of concerns about how implied false certification could subject defendants to who knows what. Raise the question of materiality. And not only said it was a vigorous requirement, said it had to be enforced significantly. So you have to look to the actual conduct of the recipients of the representations.

So what did they actually do? And I'll give you one better, Your Honor, I'll give you another Supreme Court justice although it was before he was on the bench. In U.S. ex rel. McBride v. Halliburton in the DC circuit, then Judge Kavanaugh now Justice Kavanaugh had said and held we -- post Escobar, we have the benefit of hindsight. We can go and actually look at what the states actually did. We don't just guess about whether it's something that could influence them or not.

And so what do we have as evidence here? We have the grace period. We have testimony from the state where the state says -- as I think we've already shown you -- we would never have allowed the grace period if we thought these were unsafe providers or they were unethical. They weren't going to provide the services in a legal safe and ethical manner. I believe is the actual testimony. That's what the state has told you.

THE COURT: So what are the post Escobar -- as I

looked through the table of cases for both plaintiffs and defendants, what are the bookends for the post Escobar cases, deciding this materiality question where you have an implied false certification claim and it's rooted in the idea that you failed to disclose to the relevant governmental entities something that would have affected your qualification to serve? But to use my father's corporation as an example. Lockheed Martin has multiple divisions, some dealing with UAV, some dealing with the Joint Strike Fighter program.

If one of those divisions has an ethical violation because they were doing something in the land armament division that was unknown to the aerospace division, at what -- what are the bookends advising this Court of how much connective tissue and how strong that connective tissue must be between the failed disclosure and conduct and the services performed? At what point -- what are the bookends, the most tenuous example of connective tissue to the strongest example, what -- what would defendants point this Court to -- to try to navigate that spectrum post Escobar, if you understand the question.

MR. MARGOLIS: So, Your Honor --

THE COURT: That was a terribly long question.

MR. MARGOLIS: No, it's fine. I mean, I actually do a lot of work with defense contractors, so they're not with Lockheed. So at least I'm familiar with what you're discussing. I think that Justice Thomas actually in the first

instance of giving you some of that guidance that we've shown you. In order to make this doctrine not limitless, the alleged misrepresentations have to be tied to the bills -- sorry, the actual services or goods that are being billed. So to use your example, gosh, I don't know Lockheed well enough, but to use an example of -- I'm just going to use hypothetical. So they've done something -- alleged they've done something wrong or something unethical with respect to the Joint Strike Fighter. And they're providing goods and services with respect to an entirely different program. You look to what are the representations on that bill that are being alleged to be false.

So that other program and is there some sense in which the alleged misrepresentations or ethical lapses on the Joint Strike Fighter would have any impact with respect to this entire other program? It's not really any impact; that's too broad. It's whether or not it would cause them not to pay the claims, not to pay the claims; that's what we're talking about because it's the False Claims Act, right.

I mean, here's a good example, Your Honor, and it's one -- they rely on and actually I think it's more helpful to us than not and it's a Lemon. They cite Lemon from the Fifth Circuit as if it's a qualifications case. It actually fits very neatly in Escobar. So the bills in Lemon were about -- oh, gosh, Your Honor, I'm sorry, I'm having a mental lapse.

It's hospice services.

So the claim is submitted for hospice services and then the question in the allegation was that none of the underlying requirements necessary to provide hospice services were met. For example, a face-to-face-actual meeting with a patient.

Well, if you bill for a hospice service, you were implying that you've met the requirements necessary to bill for a hospice service. And so in that instance, the Fifth Circuit again fairly straightforwardly said, again, this is Escobar; this makes sense. If you're going to bill, when you bill for hospice service, you're impliedly representing you've done the things you need to do in order to bill for a hospice service. It's really the simplest is if you bill for a gun -- I mean the simplest example of a defense contractor situation. If you provide a gun, you bill for a gun, you're representing the gun shoots. That's an implied representation that the gun shoots -- not that some helicopter doesn't fly or there's some ethical lapse relating to the FCPA -- I'm just giving you a hypothetical -- that's the gun shoot.

Here, the services are --

THE COURT: So before it was Lockheed Martin, it was general dynamics. They have an electric boat division that makes submarines, they have a land division that makes the M1A rooms, and they obviously have a tactical fighter division that

made the F16 and other aircraft. It's your reading of Escobar that this Court should look to the tether of the bill itself and the service provided, and because we're dealing with multi-tiered defendant corporations, if there isn't connective tissue between the service provided, the bills submitted and the division, it may not matter that electric boat has submarine problems with the DOD and land division does not vis-a-vis the M1. And I -- I'm only seizing this metaphor because you stated that you have some experience with defense contractors.

But in a world where there is just volume after volume after volume of regulation and requirements that the materiality inquiry has to be that precise and you think Escobar has been applied that way to multi-tier organizations such as your own client in this case.

MR. MARGOLIS: Yes, Your Honor. I mean, let's take the example again to pull the thread a little further on the defense contractors, the federal acquisition regulation. It's -- it's multiple volumes. It's immense. Before you even get to the defense federal acquisition regulation supplement, et cetera, if you bill every time -- every time you bill you're not billing that you're complying with everything in that book or those books. So in order to make it to avoid due process concerns, it's -- again, we'll get back to the salty estuary. This is a quasi-criminal statute. They have to be tied to what

you're actually billing for. So your example, the submarine division maybe there could be a False Claims Act claim maybe depending on what was billed by GD for the submarine division in their submarine bills. But not for these other unrelated programs.

And, Your Honor, let's take the facts of this case. We haven't talked about this much yet. You know, multi-tiered organization, I think my colleagues will have something to say about that certainly with respect to PPFA, but all you have here is evidence of which we would disagree with but in terms of potential affiliation between the affiliates for purposes of termination, but PPST and PPGT never participated even in a fetal tissue study. So they're being alleged to have submitted implied false certification claims for something that not only can they not prove that PPGC ever did but they would concede that PPST and PPGT never did.

Let's take Louisiana. PPGC doesn't provide abortions in Louisiana. Never -- to my knowledge, never has, certainly not to the relevant period.

So again there are significant concerns with this expansive view of implied false certification liability. Your Honor, can I at least address conspiracy and excessive fines in passing? I mean, I want to make sure I answer all your questions. I don't want the red light to suddenly come on.

THE COURT: Yes, right. And we don't have the

stoplight in this courtroom so I apologize for that. So you have two minutes --

MR. MARGOLIS: Oh, not at all. I just wanted to make sure I gave you what -- yeah.

THE COURT: You have two minutes remaining. I'll extend your time to allow you to get to those two points, but I do want your last statement to the Court raises the issue of control and affiliate defendants versus PPFA.

MR. MARGOLIS: Sure.

THE COURT: So we've heard some textualism construction of this 3729(a)(1)(G) statute which has two clauses and now I'll hear your argument for why that section in its first clause does not give rise to sort of indirect liability from the work of affiliates or at least why these plaintiffs haven't shown cause there. I know and I have your argument about why that terminology of cause and causation doesn't apply with equal force to the second clause or Clause 2, but let me hear your best argument on why this Court should not find that you caused -- that PPFA did not in any way cause the affiliates who did the wrongful conduct. Explain to me why I should divide up affiliate liability that way.

MR. MARGOLIS: Sure. Your Honor, and I'm by no means dodging but since I don't represent the federation, I don't want to steal Mr. Metlitsky's thunder.

THE COURT: We can take it up then.

MR. MARGOLIS: I think we can state with respect to the affiliates, there's no evidence before you that any of the affiliates control one another, right. So I believe the undisputed evidence is they're separate entities. They are part of the same membership organization. They have a common -- you know, share a common brand. But I don't -- there's no evidence in the record that -- and I'm speaking for the affiliate that even one of them caused any of the others to not pay an obligation.

THE COURT: Okay. So I have that argument and I assume you would disagree with Ms. Hacker on an obligation to pay versus defendants' obligation to pay.

MR. MARGOLIS: Yes.

THE COURT: That's their construction of care mark. I assume you disagree with that. I have your briefing on that, so I'll allow you --

MR. MARGOLIS: Mr. Metlitsky is going to address that I think a little bit more.

THE COURT: Okay. So I'll allow you to close with the last two items in your two minutes.

MR. MARGOLIS: Thank you, Your Honor.

All right. So I mean, one other point I think I need to raise, it's a procedural point but it's an important one because we've been talking about the separate affiliates and we moved under implied false certification for summary judgment in

our favor for PPGT and PPST, they didn't oppose it. There is nothing in their oppositions that opposes our motions for summary judgment based on what we've already talked about, which is they didn't actually do anything. They didn't violate anything. So we think that's enough grounds in and of itself procedurally under Fifth Circuit precedent, Savers Federal Savings & Loan Association vs. Reetz, to find at least in favor of those two affiliates, although we think we're entitled to far more than that, obviously.

Okay. Your Honor, there's one other -- if I can beg the Court's indulgence, there's one other piece of evidence I think it's important that I point out. It's going to be Slide 39. It's one last issue. There's an allegation here that somehow PPGC lied to Louisiana and didn't tell Louisiana that they had been terminated from Texas, right? We disagree with that because there's evidence in terms of disclosures that were made to Louisiana about the Texas proceedings, but here's what's most important from a materiality standpoint. And remember, Your Honor, as we've already discussed Louisiana, withdraw its termination notices. They withdraw, there was no termination.

Even if we didn't tell them, the relator and the state did. The relator filed a complaint on February 2nd of 2021, and they -- here we've got their complaint, relator voluntarily disclosed this information to the United States and

the plaintiff states. They gave them a copy of their complaint. Their complaint says we were terminated. It has all the theories that we're talking about before you, and Louisiana was told by the relator. And what did the state do? They withdrew the termination.

We've got in September 19th, 2022. This is part of a motion, by now it's Louisiana that's attempting to lift the injunction that was in effect. What did they say to Louisiana on September 19th, 2022? In short, PPG's termination by Texas is completely final. And what did the state of Louisiana do after that? They withdrew the termination. They have an insurmountable materiality. And it's an unpled theory, Your Honor, it's not even in their complaint. But this theory that we lied to Louisiana about Texas and therefore that's false or fraudulent. Well, we know what actually happens when the state is told, and when the state is told, they withdraw the termination notices.

Okay. Conspiracy, very quickly, Your Honor, I mean, first of all, there's no -- unlike criminal 18 U.S.C. 371, which from your time I'm sure, you know, as prosecutor and of course as a judge hearing lots of criminal cases and myself as a prosecutor, it's an offense that exists in and of itself. But that's not true if it's civil conspiracy and not under the False Claims Act, so they have to be underlying violations, and we think we've hopefully persuaded you, but there are no

underlying violations so there can be no conspiracy.

But even more importantly, Your Honor, unlike other aspects of the civil False Claims Act, and I believe you've alluded that -- to this in your questioning. There has to be an agreement to violate the law. There has to be an agreement to submit false or fraudulent claims. There has to be an agreement by two or more persons to not pay monies back that they know that they have to pay back. There's no evidence of that. There's absolutely no evidence of that.

We're not talking about individuals who work at the affiliates because you can't conspire with yourself. There's no evidence that any of the affiliates conspired with each other to not pay money back that they knew they had to pay back and there's no evidence that the affiliates conspired with the federation. You know, there you need an actual specific agreement to violate the False Claims Act and there's no such evidence in this case.

Lastly, on excessive fines, Your Honor, I can make this very brief, it's premature. I mean until you -- again, I mean, if we have persuaded you we'll never reach the point of -- the question of excessive fines, but in any event, there are all kinds of questions that would have to be resolved to get to excessive fines. What -- how many -- how many penalties are there? How many -- and we're talking about Reverse False Claims Act liability, it probably will not surprise the Court

that our assertion is if there is even a valid theory here, which we obviously don't believe. There's only one violation.

They say that the obligation arose -- it arose, I guess, presumably, when Kauffman was vacated, so there's one failure to pay the money back, not thousands. I would factor --

THE COURT: I've already mentioned that, you know, in the event we cross this bridge the Court will likely order supplemental briefing --

MR. MARGOLIS: Right.

THE COURT: -- and so I assume that you'll have arguments about the denominator, the multiplier and other points.

MR. MARGOLIS: And In re Xerox, Your Honor, just to avoid any doubt, specifically does refer to constitutional limitations under the Texas State Constitution Excessive Fines Provision applied to civil penalties like the Texas False Claims Act. So in case it matters, we just want to make it clear that actually the Texas does apply excessive fines to --

THE COURT: I have your argument. Thank you for excellent briefing and oral argument. The Court will now recess for five minutes to allow Mr. Metlitsky to set up and prepare his argument. I believe you have preserved 30 minutes of time, is that correct?

MR. METLITSKY: 25.

THE COURT: Okay, 25. So let's take a brief break. Let's reset the courtroom for that, and then we'll resume promptly at 3:25.

MR. MARGOLIS: Thank you for the additional time, Your Honor.

THE COURT: Okay. Sure thing. The red light was on, but I gave you every indication I was indulging it. So no violation, no harm, no foul.

MR. MARGOLIS: I appreciate it.

THE COURT: So let's take that brief recess and then resume promptly at 3:25.

(Off the record at 3:16 p.m.)

(On the record at 3:30 p.m.)

THE COURT: And the Court is back on the record in 2:21-CV-022-Z for continuation of the hearing on the pending motions for summary judgment.

Mr. Metlitsky, you may proceed and you have 30 minutes on the clock.

MR. METLITSKY: Thank you, Your Honor. And if I could get a time check at 20 minutes with five minutes left in my time, I'm going to give Mr. Ashby five minutes also. Thank you, Your Honor. May it please the Court.

The first thing I want to say is just, as you know, and I want to make clear that we join in all of the affiliate's arguments, and since our liability depends, in part, on their

liability, we hope you rule in their favor which would require ruling in our favor. I'm here to talk about arguments that are unique to PPFA, independent of the arguments concerning the affiliates.

And I wanted to start with I think the question you sort of ended with, about evidence of control and its relevance to the causing liability. And just as a clerical point, I think the other side would agree with me. I think for the implied false certification they're relying on (a)(1)(A), not (a)(1)(G) which includes similar causation language. But the result is the same either way.

The answer to your question is no. Evidence of control is not relevant to that question -- or evidence of general control. But before getting to that I just want to sort of make clear that their evidence of control is, I would say, overstated, really nonexistent because it doesn't account for the way that PPFA is organized. All agree that PPFA and its affiliates are separate corporations. PPFA is a membership organization. The affiliates are members of PPFA. Nobody argues that there's any kind of veil piercing or anything like that. Their argument is just there's corporate separateness but there is nevertheless some amount of control that they think is relevant to -- to PPFA's direct liability.

The problem with that is they're using a construct -- they're assuming a construct like a parent-subsidiary

relationship in which the parent ultimately dominates the sub, right. And so it can exercise control just as a matter of fact. The problem is that's not true of this organization. Affiliates also exercise control over PPFA. In fact, they exercise substantial control. Most important, they are the ones that can amend the bylaws, can amend all the rules.

So they have ultimate authority over the scope of PP -- what PPFA can do. Now their main evidence of control is the fact that PPFA runs this accreditation process to ensure that the affiliates are complying with the standards of affiliation. But that's by virtue of the bylaws which -- over which the affiliates have ultimate control, and they also have ultimate control over the standards of affiliation themselves.

So the fact that the affiliates have delegated to PPFA authority to conduct the accreditation process doesn't really make sense as evidence of control in any -- any relevant way, since the affiliates ultimately have the control. But so I think as a factual matter you shouldn't look at that kind of evidence of control.

But now assume, forget everything I just said so that I can answer your question. If you think there is evidence of control, which again, we disagree with, the answer to the question is no. I think the basic -- evidence of control of let's say a subsidiary which this is not, but assume it was, evidence of control of subsidiary goes only to derivative

liability, not to the parent's direct liability. That principle is set forth in Best Foods. And the quote -- I think the best quote from page 68 is just "Control of a subsidiary, if extensive enough, that is, if it rises to the level of veil piercing, gives rise to indirect liability, not direct liability."

And the reason that's so is because the doctrine of corporate separateness assumes a substantial level of control, the natural kind of control that a parent exercises over a sub, and nevertheless says the parent cannot be held liable unless you cross the threshold into veil-piercing land, right.

And so if you allowed evidence of control of a subsidiary to establish the parent's liability when that evidence of control does not cross the line into veil piercing, you would be undermining the principle of corporate separateness.

Now I don't think that completely answers your question because Congress, of course, can alter that rule if it wants to, and I'm understanding your question to be whether that causation language affects that -- that result. And the answer to that is no for two reasons. The first is sort of a doctrinal reason, the second is a sort of a first principles reason. So the doctrinal reason is just that it's undisputed what the standard for causing a false claim is. I think we actually agree with the other side about that.

We quote from the Hockett case from the BBC. The question is whether the -- whether the parent was directly involved in submitting false claims or causing them to be submitted, that is directly involved in the claims process. And I'm quoting from that case again. "Being a parent corporation of a subsidiary that commits an FCA violation without some degree of participation by the parent in the claims process, is not enough to support a claim against the parent."

So evidence of control over the subsidiary, sort of general evidence of control, is just irrelevant to whether the parent has caused the subsidiary to file a false claim. You need evidence of actual participation in the claims process, and I can get back to that in more detail when we talk about the implied false certification claim.

The sort of bigger picture first principles argument is, as I said before, the effect of looking at evidence of control -- general control over a subsidiary to hold the parent liable, if it doesn't cross the threshold into veil piercing, would have the effect of sort of diluting the protections of corporate separateness, and as Best Foods held, you don't assume, absent a very clear statement that Congress intended not just to abrogate some common law rule, but really the most fundamental rule in all of American corporate law.

So that's our basic answer to that question.

Now, the other question that is relevant to PPFA really is just, you know, can PPFA be held liable for the reverse false claims allegations and the implied false claims. So I'll start with the reverse false claims. Their theory is that PPFA caused the affiliates, the affiliate defendants to avoid their obligation to pay the government by crafting, you know, they allege by crafting a litigation strategy that was meant to principally get an injunction in federal court to preclude termination from Medicaid rather than using the state Medicaid administrative procedures. That's the basic outline of the theory as I understand it.

There are several problems with that, and the first one is that statutory one that you -- that you mentioned before. As the Court knows, there are two separate sections as my friend on the other side said. I'm talking about now (a)(1)(G). They're two separate clauses in (a)(1)(G) that are separated by the word "or" so they're independent. One uses causation language, that is language that creates third-party liability, and one that does not use that language. And there's a fundamental canon of construction we cited Scalia and Garner, I think the case that's routinely cited from the Supreme Court is Russello against the United States. And the canon is simply that when Congress uses particular language in one provision of a statute and excludes that language from another provision of the same statute, the Court should assume

that the inclusion and exclusion was deliberate such that you should not apply that language to the part of the statute where it doesn't exist.

And that's crucial -- that's particularly crucial in this case because the Caremark case that they were relying on, it was construing the previous statute that had that causation language applying to the entire clause. Congress amended that statute to again separate -- separate it out into two clauses divided by the word "or" disjunctive, to use that language in one clause and not in the other one, and so you just have to assume that if Congress intended for liability of a party that causes somebody to do something under the first clause, they do not mean -- they do not intend to create liability for somebody who causes somebody else to avoid an obligation under the second clause. If they did intend that they would have applied the causation language to the second clause --

THE COURT: That's certainly the canon.

MR. METLITSKY: -- yeah.

THE COURT: But what -- what other contemporaneous documents without inquiry into any subjective legislator intent, what other contemporaneous documents would point to that Congressional purpose? Is there anything in legislation that was before committees that suggested that this -- this disjunctive division of causation was intended to remedy some confusion --

MR. METLITSKY: Yes.

THE COURT: -- in the courts? What is your best argument beyond just mere canons that the Court should read that or so strictly?

MR. METLITSKY: Yes. So I mean, there's not much in the legislative history but there's a little bit.

THE COURT: I was avoiding the term "legislative history" because it gets you in trouble.

MR. METLITSKY: There's not much in the -- you know, the committee reports. But there is a little bit. The idea was that Congress wanted to make clear that it was -- that a failure to -- the previous clause really by its term applied to statements that led to the avoidance and other things of obligations to pay the government, right. And Congress wanted to make clear that there was also a -- it was also a violation to just fail to pay the government. No state -- that's what we're talking about in this case, right. Just there was an obligation to pay and it was avoided. The defendant. And that is a direct sort of relationship between the payer and the government.

You can imagine why you might want to have causation liability for statements because, for example, you might have an innocent party. The guilty party makes a statement that causes the innocent party to do something that deprives the government of money. But it's strange to think of somebody

innocently avoiding a direct obligation to pay. And so, you know, that's the best I can do. I think the better argument is the canons and it's not just through solo canon. You asked earlier was there some kind of rule of lenity type rule that would apply to a civil statute like this, a sort of penal civil statute like this, and the answer is yes.

So the -- you know, and we can do a 28(j) letter, we just researched this a little bit over the lunch hour. But I think one of the principal federal cases is the Commissioner of Internal Revenue against Acker; it's 361 U.S. 87 at page 91. This was a provision involving the tax code obviously. But it was a penal provision. It included penalties and the Court held that someone is not subject to a penalty unless the words of the statute plainly impose it.

There's also a Western District of Texas case applying that same rule to Texas civil penal statute -- you know, civil penalty statutes that -- the cite there is 348 F. Supp. 3d 594 at 599. And there is a Louisiana case, 268 F. Supp. 3d 1132 at 1150. So if the Court had any doubt about it after applying the Rizzolo canon and all the rest of it, I think that canon would resolve it.

So that's our first argument, just as a statutory matter. The reverse false claim against PPFA is precluded.

The second argument is that even if there was causation liability, this wouldn't count as causation

liability. Again, the argument is that lawyers in the litigation law department which -- which the other side says is synonymous with PPFA devised the litigation strategy and advised their clients, the affiliate defendants, to do several things principally, to file an injunction in federal court to prevent their termination from Medicaid rather than using the state administrative process.

And so there are several problems with that. The first just as a matter of law, a legal strategy developed by lawyers can't cause their clients to do anything because it's just legal advice. The clients ultimately decide. And there is a case I think that's pretty much on point. It's not about the False Claims Act. But it's about one of the securities fraud statute which penalizes causing false statements in a proxy. The case is called Adelphia Communications, we cite it in our brief. And the Court says in no sense can an attorney give legal advice to a person or corporation making a statement or assisting in its drafting be understood to cause the statement to be made because they're just acting as a lawyer. And the client makes the ultimate decision. And here, if you needed any more, there is deposition testimony from representatives from at least three of the affiliates saying that it was their decision to take this route. And I'll cite -- I'll cite the docket numbers, 475-3 at 46 to 49, that's PPST. PPGC is 484 at 13. And PPGT is 484 at 25.

So not only is just as a matter of law, it seems to me this theory is precluded as a matter of fact. There is undisputed testimony that it was ultimately the affiliates' decision.

Second, it seems to me like there's a disconnect between the legal strategy that, you know, they rely on and the reverse false claim. Because the legal strategy is all about preventing the termination of the affiliates from Medicaid. But the reverse false claim is not about that. The reverse false claim is as they describe it, 60 days after the injunction was vacated the affiliates were required to, you know, pay back the money, right. If you agree with that theory, none of the -- none of the legal strategy that they describe, you know -- you know, getting an injunction, getting a grace period and all that has anything to do with repaying the money. So that's just an independent reason why it's just sort of a non-sequitur, their theory of causation liability.

Third, as we describe at length in the briefs, it's just sort of black-letter law that legal advice can't serve as the source of liability and that's all they're talking about here. And then fourth, all of this relies on the proposition that the litigation and law department is PPFA and that just is not so. The litigation law department is within PPFA in the sense that it is employed by PPFA. But it's expressed in the bylaws that they can represent PPFA. They can represent

affiliates. And when they represent affiliates, they have an attorney-client relationship with the affiliates which, for example, means that they can't divulge confidential information without consent.

And that is a totally ordinary way of dealing with legal advice in a corporate family. You know, it's in-house --

THE COURT: What do you make of Hanger 1 then? So I believe it's cited in plaintiffs' brief. The test isn't necessarily lawyers working in-house versus out-house, although the practice of law often feels like an out-house. I'm making up a terminology here. There, and I believe this is at 563 F.2d 1158, the relevant inquiry is scope of authority. Where someone less than an officer is involved, corporate criminal liability is imposed only where the criminal employee has a position of substantial responsibility and broad authority. So citing to this Court your corporate taxonomy, which I'll take you at your word, how is it that those decision-makers in the litigation and law department or the law and litigation department do not exercise a position of substantial responsibility and broad authority?

MR. METLITSKY: So that's not our argument. Our argument is just that it's totally customary for -- in a corporate family. Just think of a parent sub for purposes of -- because that's -- we all understand that. You can have officer -- shared officers, shared directors, shared accounting

departments and shared legal departments. And the presumption from Best Food is that these people could all be double-hatted, and that they're acting appropriately, wearing the appropriate hat at the appropriate time unless there's some evidence that they're not. In other words, unless there's some evidence that they're -- in this case, that they're actually representing PPFA when they're purporting to represent one of the affiliates.

And the -- and I think they recognize that because that's the sort of crux of their answer in the reply brief. But their only evidence that -- that the -- that the lawyers in this department were actually representing PPFA rather than the affiliates is that it would have been better for the affiliates to go through the administrative process rather than to seek a district court injunction. But, first of all, that's just the legal strategy call, you know. I don't know why they think they're right about that. The injunction was successful, you know, initially and they're not representing that the administrative process would have been successful.

But even more important, there is testimony from PPST itself, a representative from PPST that they themselves decided that it was better for them to go to court rather than through the -- than through the administrative process, because they said the administrative process was, quote, "not a friendly environment" and we didn't think that we were going to be

heard. This is 475-3 at 46. And that they had, quote, "not favorable outcomes" going that route before. That's the same cite at 49. They made -- the affiliates themselves made a reasoned decision that going for the injunction was better for them than going for -- than going through the administrative process.

And so that's their -- that's their only evidence that the lawyers in this department were representing PPFA rather than the affiliates and it just seems to me to fall apart on the actual record. Parenthetically, it was their only evidence that they cited of conspiracy.

So, you know, each of those is an independent basis to reject causation even if you think there is causation liability.

And then the last point is lack of scienter. You know, PPFA there's just no evidence, no reason to believe that PPFA would have understood that affiliates would have had a repayment obligation for funds received during the pendency of an injunction, the whole point of which was to preclude their termination from Medicaid, especially when the state of Texas -- as Mr. Margolis pointed out, the state of Texas told the Fifth Circuit that it was irreparable harm to continue with this injunction because they would have to continue making Medicaid payments while it was in place.

And certainly there was no possible way that they

could have understood that providing legal advice to seek a federal court injunction or a grace period or something like that could somehow count as a failure to satisfy a repayment obligation to the government. That is such a novel -- I mean, there's nothing like that anywhere in any case. And the idea that anybody would have had that in their head seems to me to be totally outlandish, and there is certainly no evidence to support it.

So that's our argument on reverse false claim as to PPFA. As to implied false certification, you know, there's the underlying question about whether there were, in fact, implied false certifications. Then there's the question of whether PPFA could be liable under that causing language, right. So I started going through the relevant standard earlier. The question is whether PPFA was directly involved in the actual claims process and there just is no -- there just weren't. There's no evidence that they were. The other side cites the accreditation process, which has nothing at all to do with the filing of state Medicaid claims.

They cite various, you know, guidance documents like the Medicaid Toolkit. You can look at these documents. One of them is at 475-10 at 119. Another one is at 177. What you'll see is that they're just basic explanations of how Medicaid -- Medicaid and mostly federal Medicaid works. Had nothing to do with the actual claims process. And that is the kind of

evidence that courts have required in the past to hold a parent liable for its subsidiary's false claims. So, for example, in the Hockett case, the parent company was, quote, "directly involved in the process of finalizing the cost report and billing the government." Whereas, you have other cases like U.S. against Executive Health. This is a EDPA case 196 F.Supp. 3d 477, which is a lot like this case. You know, there, the parent benefitted from the subsidiary financially. They had knowledge of the subsidiary's practices overlapping employees. They performed joint marketing efforts. They importantly had knowledge of the relevant Medicaid -- Medicare and Medicaid standards with which the sub needed to comply, but no liability because they weren't actually involved in the claims process itself.

THE COURT: So -- and you do have five minutes left. I wanted to give you that warning. So you're joining Mr. Margolis in following some of the defense contractor analogies that we discussed that this Court should tether its understanding of corporate control and parent subsidiary liability to claims processing.

MR. METLITSKY: Yes, that's exactly right.

THE COURT: You have to have the fingerprints of the parent on the claims as they're processing.

MR. METLITSKY: Exactly. Exactly. Because otherwise you have the problem that we discussed at the very beginning,

which is you're holding the parent liable for just ordinary interaction with a subsidiary. Again, parent sub is not really at all what's going on here. But even if you think it were, you would be holding the parent liable for just normal interaction without finding veil piercing.

So that's our argument on causation. That applies to both the implied false certification claim, you know, pretermination letters and the one post the termination letters. There's also a scienter problem for the pretermination letters. This is the one having to do with the videos. They don't have any evidence that PPFA itself knew anything about that. The only thing they cite is Texas' termination letter, which isn't evidence of anything. And then the period of termination, I'm not totally sure I completely understand that claim. But the -- they're talking about claims that were made when the injunctions were in place, right.

And since you're looking at scienter at the time that the claims were made, I don't see how PPFA or really anybody could have known that those claims were false at the time because the entire theory depends on the injunction being reversed. If the injunction had been upheld, I assume none of us would be here, right. Right. Otherwise, their theory is totally outlandish, right. The only way any of this works even, you know, possibly is because the original injunction that precluded termination was reversed.

And when you're judging falsity at the time the claim was made, this was during the pendency of the original injunction, how could there be any scienter? You'd have to be clairvoyant to know that the injunction was going to be reversed.

So that's our argument for PPFA on implied false certification. I don't know how much time I have left.

THE COURT: I'll give you two minutes to conclude with any issues that are left unaddressed by those incorporated by reference --

MR. METLITSKY: Yes.

THE COURT: -- to Mr. Margolis' --

MR. METLITSKY: Yes. So the only other PPFA-specific issue, there's a question about the number of violations. And Mr. Margolis touched on it, you know, it's not every single claim. You know, the reverse false certification theory, for example, would be one failure to repay the government. But in all events, the per claim penalty theory can't possibly apply to PPFA because PPFA did not file claims. Everybody agrees PPFA did not file claims.

And so the rule -- this is a case called U.S. against Bornstein from the Supreme Court.

THE COURT: Could you spell that? Could you spell that for the court reporter?

MR. METLITSKY: Yes, B-O-R-N-S-T-E-I-N. It's 423

U.S. at 313. The focus in each case has to be upon the specific conduct of the person from whom the government seeks to collect the statutory penalties, okay. And the question is, what causative acts did that person engage in? How much causative acts did that person engage in? So on their own theory of reverse false claim, I guess it would be this setting up a litigation strategy. I think that's -- I don't know, one act. I don't know how many acts but it's like one or two, something like that.

As to the implied false certification theory, again I don't totally understand their theory, but it can't possibly be every claim, because again PPFA didn't file a claim. They would have to demonstrate what causative act PPFA engaged in that resulted that caused the filing of these claims and that would be one violation. So --

THE COURT: Okay. And I'm assuming you would join Mr. Margolis' request that this Court order supplemental briefing should we ever approach the --

MR. METLITSKY: Oh, yeah. Totally premature to get into this at this point. I just wanted to get that on the record.

THE COURT: Okay. Understood. Thank you for your argument, and thank you for your briefs to this point.

All right. Five minutes remaining on the clock for this side of the courtroom.

Mr. ASHBY: Thank you, Your Honor.

Danny Ashby for PPFA. May it please the Court. May be able to get back four of these minutes.

So I'm just addressing pretrial publicity, and I think as I heard from plaintiffs' counsel, they don't think a gag order is appropriate. We certainly agree with that. There are other ways to address that in terms of, you know, jury selection, jury instructions --

THE COURT: If we get to that --

Mr. ASHBY: -- questionnaires.

THE COURT: Yeah, I was going to mention questionnaires. If we get do that point, we've had some high-profile cases in this courthouse from Oprah and the cattleman's case to some of my FISA cases when I was an AUSA. One solution is a questionnaire. We can maybe cut down on a potential jury pool taint that way. I do want to admonish counsel from DC, Austin and Dallas that this isn't a division with the standing jury pool. And so we have to approximate the number of prospective jurors summoned each month. And so if we're going to do things like propose questionnaires and we get deep into the litigation, just plan for the logistics of that. I'll want to preview that for the clerk's office because we actually have to send out the summons, we have to send out the questionnaire.

We did a lot of this work during COVID. So if there

are lesser restrictive means available that the parties can agree to, if we get this far into litigation, that's a step that may be unfamiliar to those of you practicing in the Dallas division or in the Western District of Texas. We actually have to send out the summons, and we have to do head counts on the front end. So --

Mr. ASHBY: Understood, Your Honor.

THE COURT: The questionnaire, I wanted -- thank you for reminding the Court about questionnaires. That's something that we'll want to front load if we get that deep into litigation.

Mr. ASHBY: That's all I have then unless the Court has any questions.

THE COURT: Okay. So you're not asking for a prior restraint of the press?

Mr. ASHBY: Correct.

THE COURT: Okay. That's good.

Mr. ASHBY: Absolutely.

THE COURT: I wasn't going to do that anyway.

Mr. ASHBY: Thank you, Your Honor. I appreciate it.

THE COURT: I used to teach First Amendment law, like we're not going to do that. I just I wanted to flag this issue should this continue into litigation. I know it's contentious. I know there's a lot of advertising, and there's a lot of media attention. I'll just ask your guidance from both sides of the

equation, plaintiff and defendant. So at this time, let me confer with my clerks and let's see if we have questions remaining from the Court.

(Pause in proceedings.)

THE COURT: Okay. So by my count, I believe plaintiffs here have reserved 30 minutes of their time for rebuttal. Is there a division between the attorneys sitting at the table of that time?

MS. HACKER: I'll be taking all 30 minutes, Your Honor, but I would request a brief recess before I begin just so I can get myself organized a little bit.

THE COURT: Okay. Well, I was hoping that everybody could make their Southwest flight either to Austin or Dallas or DC. I was trying to move efficiently but that makes sense. So let's recess briefly for another five minutes. That'll allow counsel to gather their notes and also to interface with the technology if necessary. I hate shuttling in and out but I understand all of you worked very hard to be here. So I want to make sure that you're set up properly. So let's take another brief five-minute recess, and we'll turn for the final 30 minutes of rebuttal argument. At that point, I'll dismiss you so you can make your flights. That's the Court's intention at least.

(Off the record at 4:03 p.m.)

(On the record at 4:12 p.m.)

THE COURT: And we are back on the record in Civil Case Number 2:21-cv-022-Z for continuation of the hearing on the pending motions for summary judgment.

And, Ms. Hacker, you have reserved 30 minutes for rebuttal. You may take as much of that time as you need and allocate it. If I interrupt you, it's only because I have questions to ask. You may proceed.

MS. HACKER: May I request before I begin a warning -- a time check at five minutes left?

THE COURT: Okay.

MS. HACKER: Thank you.

THE COURT: You will receive it at the five minute remaining mark.

MS. HACKER: Thank you.

Your Honor, I just wanted to take some time to respond to some of the assertions made by my friends on the other side. I apologize if this is a bit disjointed but these are all the bits and pieces left to address here.

The first point I'd like to address is the argument -- or I guess the emphasis by Mr. Margolis on the fact that there is no case like this one, and I'd like to actually first apologize for misstating that there was an injunction in the Kane case. I was confusing that case with a different one.

But I think the easiest explanation for the fact that there's no case like this one is because Medicaid providers use

the administrative procedures that they are afforded. And frankly, no one is foolish enough to not do that because the consequences of doing that are so severe. As the Fifth Circuit pointed out the first time they overruled Judge Sparks, if you don't challenge the suspension or the termination in the administrative proceedings, there is nothing in the administrative record in your favor. And so when you go up on judicial review, you don't get to make the case at that time or even if you choose to go to federal court instead, that judicial review is only on the administrative record. And if you skip that whole process, you've got no evidence in your favor.

So it would make sense that no one else would have made that choice.

Secondly, Mr. Margolis placed a lot of emphasis on the fact that, you know, if the state hasn't asked for the money back and all of this, there's some sort of due process problem here. Well, the first due process that the defendants are afforded is in challenging the termination itself if they think it's baseless. All they have to do is ask for an informal hearing. And you can't really complain about a lack of due process if you don't even engage in the process that you are afforded.

The other point I wanted to address on that issue is that, you know, yes, there are lots of regulations and rules in

the Medicaid program. They are very onerous and for good reason because the state -- or the government spends a lot of money on Medicaid and Medicare. So it expects providers to fulfill those requirements. If -- if you can't abide by all the rules, then don't take the money. It's a contract between the government and the provider and the provider is asserting that they can, in fact, follow all of those rules and that is in fact what it states in the provider agreements for both Texas and Louisiana.

And addressing the point about recoupment specifically, the idea that there can be no overpayment -- or liability for retaining an overpayment unless the state tries to recoup the money first or ask for it back, that's just incorrect as a matter of law. The federal regulations specifically state that providers and suppliers have a clear duty to undertake proactive activities to determine if they have received an overpayment or risk potential liability for retaining such overpayment.

And then in another spot, the regulations say providers and suppliers cannot rely on the OIG to point out their overpayments for them. Providers and suppliers are obligated to identify the overpayments they have received.

Basically, the rule that they're advocating for here that there has to be some sort of recoupment or restitution before you could be liable here, that would basically totally

nullify the reverse false claims provision. No one could ever be liable for retaining an overpayment if that was -- if that was the rule. And incidentally, the bond -- the rule regarding bonds that they would advocate for means that if a judge denied a bond on a preliminary injunction, that would foreclose the other party even if it was later found that the injunction was wrongly issued. That would totally foreclose that other party forever from being able to get the money back that they had to pay under that injunction and that's just incorrect according to the law.

Moving on to the issue of whether the terminations were effective or not, the injunctions themselves, federal courts do not have authority, generally speaking, to stay state proceedings. Federal courts can enjoin state officials from acting. And that's what the effect of the injunctions was here. They enjoined the state officials from enforcing the terminations. And for authority on the point that I just mentioned that they don't have authority to stay state proceedings, that's the Blanchard case cited in our reply brief.

The termination happens by operation of law and in fact Planned Parenthood knew that lifting the injunctions would mean that the state could then enforce the terminations.

Brian, could you bring up ECF 518-13 at 122. And if you could pop out that language for me.

So there at the bottom of this paragraph here beginning at the -- with the -- at the same time, "At the same time we are waiting for a federal district court to lift the injunction which will officially allow HHSC to enforce the law." And this is an e-mail from PPFA employee.

Moving on to the -- the issue of the Louisiana injunction, there were -- it's true that Louisiana had asked for a stay based on two reasons, a case involving sovereign immunity that was pending and also the -- the Kauffman case, the en banc proceedings there. However, as Louisiana made clear when they asked the court to lift the injunction, the -- it makes no sense to keep the injunction in place because of the second issue because the first issue took care of the whole -- the whole issue, right? The en banc court said that there was no cause of action. There cannot be an injunction based on the likelihood of success on a cause of action that doesn't exist.

So regardless of the outcome of the case on sovereign immunity, it would have no import on that case any longer given that their underlying cause of action was now gone.

Additionally, Planned Parenthood also understood the Kauffman case to have that effect on the Louisiana injunction regardless of this sovereign immunity case.

So, Brian, could you bring up ECF 518-4 at 454. And if you could pop out the language there. This is an e-mail

from Melaney Linton who's the CEO of PPGC.

So if you go down to the next paragraph at the end of that one. So where it starts -- where the wording starts -- is bold there -- "Unfortunately, Louisiana Department of Health asks the Court to allow them to move forward with blocking Medicaid patients access to Planned Parenthood. We have been expecting Louisiana to take this action since a recent ruling from the Fifth Circuit Court of Appeals gave them the green light to do this."

Moving on to the issue of this argument about the word "improper" in the statute. What that kind of reminds me of is that there -- and I think we said this in the briefing. I think the defendants are kind of trying to read in an extra requirement into the law. In other words, that it has to be fraudi/fraud in order for you to be liable. But the statute itself defines what fraud is. And retention of an overpayment is improper under the statutes. So you kind of take care of that by the fact that you've retained an overpayment.

THE COURT: It would be nice, though, if the Section B definitions provided terminology for what improperly means in this context or if courts had -- I mean, we have definitions of material obligation knowing, knowingly, claim but nothing regarding improperly. But it doesn't sound like counsel for plaintiff or defendant can point to any circuit level authority instructing the Court's construction of that

additional language. It's just canons at this point. Is that correct?

MS. HACKER: Yeah, I think so. And, you know, I think that the Court if it looks at, you know, one of the important principles in statutory construction is not to look at a statute in isolation but to look at all of the statutes included, the context of it. And I think the context of it would indicate that retention of an overpayment is an improper act that the False Claims Act intends to punish.

THE COURT: Yeah. Before you can invoke rules of lenity or related concepts, you have to find an ambiguity first. And so contemporaneous statutes and documents, you know, whether this was, you know, part of a, you know, coherent government code, like, you got to have the ambiguity first before you get to whip out Scalia's favorite toolkit of canons. So, yeah, I understand your point on that and you're arguing that it's not in fact ambiguous.

MS. HACKER: No, that's right.

THE COURT: Okay. All right. You may proceed.

MS. HACKER: Speaking to the issue of the grace period, what the grace period meant is that the state would delay its enforcement of the termination. It didn't mean that they were not terminated and in fact as I think the Court knows and recognizes, Judge Livingston's opinion from the Travis County District Court supports this. But if -- they also made

a lot of the fact that there was no statutory authorization for Texas to even allow this grace period, and now I'm taking off my Texas hat for a moment and speaking only as relator's counsel, but if there is no statutory authorization for it, perhaps it was an ultra vires action, but that doesn't have anything to do with the issues in this case, I don't think. They were just saying we will delay enforcement of this termination so that you can transition your patients.

The issue of whether the video provided a basis for termination, again they never contested that. If they had evidence to suggest that that was insufficient, the time to raise that would have been in the administrative proceedings. At this point they've now waived it. And the important point I think about the Fifth Circuit's conclusion is, yes, Judge Elrod wrote a concurring opinion but one thing that she pointed out was that there was no evidence submitted by Planned Parenthood and they admitted that they had provided no evidence to show that the video was somehow unreliable evidence.

So the conclusion of the state that the evidence was sufficient to show program violations, whether that be through actual violations or the willingness to engage in unethical conduct itself being a violation, the state's conclusion was that was sufficient to justify termination and that conclusion was not disturbed because they did not challenge it at the appropriate time.

Moving on to the issue of whether the facts surrounding the Texas termination were disclosed to Louisiana.

Brian, if you could pull up ECF 518-4 at 253.

So actually, Brian, could you back out of that detail real quick. Just go to the main document and then if you could zoom in on number -- Paragraph Number 14. It's down at the bottom there. So this is part of the agreement that PPGC signed when they enrolled in the Medicaid program as a provider. And as you can see under paragraph 14, it states, "I understand that I shall report any of the above conditions to the Department of Health and hospitals, and once enrolled I understand upon discovery of any of the above conditions, it is my responsibility to report them immediately in writing to DHH program integrity section" and it gives the address.

And I believe, Your Honor, if you look at the letters that PPGC did eventually send to what is now called LBH but at that time was called DHH, that is in fact the address where they sent those letters. So that is an acknowledgement of this obligation here.

Now, Brian, if you could go to that other language, please.

So this document clearly imposes the obligation to -- for the provider to disclose to the Department of Health, not to the Louisiana Department of Justice or anybody else, but to the Louisiana Department of Health, these things. And it is

such an important obligation that it says here in this agreement that if they continue to provide Medicaid services or participate in the program when they have been terminated from another state's program, it is a crime to continue participating in the Louisiana Medicaid program. A crime that's punishable as a felony for up to five years' imprisonment and she also notes here in the last paragraph, "I understand that any claims for payment with a date of service during a period of exclusion will be subject to recoupment. In addition to other fines, penalties, or restitution, resulting from the criminal prosecution."

So this is a serious obligation with serious consequences for noncompliance and they did not comply with this requirement.

THE COURT: So what of this defense contract metaphor that the Court teased out? You can choose a different corporate structure or sector if you want, neither side disagrees that managed care before and after the ACA involves voluminous requirements. I asked defendant counsel to identify sort of the bookends of connective tissue necessary to connect FCA liability where the provider services are arguably distinct and different from what another division does even if that division is accused of ethical violations. I think I got during defendants' portion their reading of Escobar.

What other cases should the Court look to and this is

essentially materiality analysis to decide whether the claims submitted and other divisions or portions of the corporate architecture can be rendered liable under the FCA? At some point, the connective tissue is too tenuous. At some point in an over-bureaucratized sector, we have to have some due process principles obtained if their reading of Escobar is wrong or if, you know, of other cases that argue against the sort of corporate layering and structuring that I heard from defense counsel, let me know.

Is their reading of Escobar wrong, are there other cases where the certification was this mismatched to the service provided? Can you think of example cases. I know we've talked Escobar to death but other instances where -- and I used defense contractor illustrations only because it's familiar to me and they're some of our larger contractors, but at some point it becomes too attenuated.

Are defense -- are the defense attorneys correct in reading Escobar to require something as specific as a division's participation in the actual claim processing and if not, how far out can we get before we run afoul of due process principles? And we're only here because this is that strange quasi-criminal realm and, you know, the Supreme Court and the Fifth Circuit have advised that we be cautious about extending liability in perpetuity for every certification signed when that could involve hundreds of regulatory obligations. So if

they misread Escobar as applied to this case let -- you know, I'll hear your argument on that. And then any cases where there is an arguable mismatch between the certification and the service provided. What's your best case for that kind of mismatched dynamic in an FCA setting?

MS. HACKER: So if I understand the Court's question correctly, I think we discussed some of these cases in our reply brief. But the case that comes to mind immediately is the Harvard College case and there, even though the defendant had no involvement in the actual claims process, he was involved in reviewing and auditing the financial activities of the entity. And so that was deemed enough for liability if I remember that case correctly.

And so here we have extensive involvement of PPFA in the affiliates' financials in their Medicaid participation. So even if PPFA was not the one hitting submit on the claim, they were well aware of all of the claims activity that was going on here. And I think -- and I think we -- you know, make this caveat in the reply brief, you know, if you -- it kind of depends on the facts, right? You know, what kind of implied false certification case you're talking about? If you're talking about an instance where a Medicaid provider is overbilling or billing for services not provided, it would make sense that the other defendant you're trying to hold liable would have to have some knowledge of, you know, the particulars

of that falsity.

But here we don't even have to get into that, you know, granular basis because we know that PPFA knew of the false basis for the submission of claims. They knew that they had been terminated from Medicaid in Louisiana and Texas; they knew that they were continuing to submit claims. The affiliates all underwent the rigorous accreditation process which includes a financial audit several times during the pendency of the injunction.

So PPFA was well aware of this. And PPFA's involvement in the response to the terminations and the litigation and all of that, they were well aware of all of these facts. So there's not really any -- I think the -- the issue of, you know, Does the right hand know what the left hand is doing, that doesn't really come into play here because they did know and you can't really -- you can't really argue that they didn't know of the basis for the false claims here.

THE COURT: Okay. I think I have your argument on that. You're approaching the five-minute mark, so I'll allow you to close with whatever arguments remain of your rebuttal.

MS. HACKER: Yes, Your Honor. I think I just have a couple of quick little clarifications that I just wanted to offer for the Court. In terms of the statutory interpretation. I just wanted to offer that the Kane case, which is 120 F. Supp. 370 recounts the history of the false claims -- or excuse

me -- of the reverse false claims provision in the False Claims Act. It might be helpful to the Court.

I also wanted to clarify for the Court just to make -- make clear and avoid any confusion but the implied false certification claims that we're making, Number one, it's the -- the post-termination claims in both Texas and Louisiana. So Texas 2017 to 2021 and Louisiana 2015 to 2022. The second category would be the claims submitted in the Texas grace period. And the third category would be Louisiana post-Texas termination claims which would be February 2017 to November 2022, so those are some different subsets there.

The claims under the first and third ones largely overlap with the claims at issue under the reverse false claim theory. So those are alternative arguments. The only one that doesn't overlap is the implied false certification claims under the grace period. That would not be encompassed under the reverse false claims theory.

And then just one little clean-up item. I believe that in our briefing we stated that the excessive fines defense was an affirmative defense, but what I realize the Court had already held that it was not an affirmative defense. I believe in its ruling on the motion for reconsideration on their motion to amend the complaint -- or excuse me, reamend their answer, so I just wanted to clean that up.

But with that, unless the Court has any further

questions, we would ask the Court to grant the plaintiffs' motion for summary judgment.

THE COURT: Okay. With that, the Court will take this case under advisement. I have your briefs. I now have your arguments. The Court will also finally adjudicate pending motions on various sealing and unsealing. I don't know that those orders will be for terminus but those will be forthcoming.

So I have your case. I have your arguments. Thank you for traveling great distances to be here. And the Court finds that this case was well briefed and well argued, and I have what I need to decide at least this portion of the case.

So with that, counsel are excused, parties are excused, and the Court stands adjourned for the remainder of the day.

COLLECTIVE: Thank you, Your Honor.

(The proceedings adjourned at 4:38 p.m.)

C E R T I F I C A T E

I, Shayna Montgomery, United States Court Reporter for the United States District Court in and for the Northern District of Texas, Amarillo Division, hereby certify that the above and foregoing contains a true and correct transcription of the proceedings in the above entitled and numbered cause.

WITNESS MY HAND on this 17th day of August, 2023.

/s/Shayna Montgomery
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